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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]

JUNIUS IRVING SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JUNIUS IRVING SCALES, *Petitioner*, *v.* UNITED STATES OF AMERICA.	No. 488

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the court below (R. 455-95) is reported at 260 F. 2d 21. The opinion of the court below affirming the judgment of conviction after petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the opinion of this Court reversing that judgment is reported at 355 U. S. 1.

JURISDICTION

The judgment of the Court of Appeals (R. 495) was entered October 6, 1958. The petition for certiorari was filed November 3, 1958 and was granted December 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury

verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2835), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional (a) on its face, or (b) as applied in this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f)), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act in accordance with the standards prescribed in *Yates* v. *United States*, 354 U. S. 298 and other decisions of this Court; and

4. Whether petitioner was denied a fair trial by virtue of (a) the method of empanelling the grand jury, (b) the "Congressional findings" about the Communist Party in the Internal Security Act of 1950 (50 U. S. C. 781) and the Communist Control Act of 1954 (50 U. S. C. 841), (c) the denial of petitioner's request to examine the full texts of written statements furnished to the Federal Bureau of Investigation by prosecution witnesses, or (d) the erroneous admission of prejudicial evidence.

STATUTES INVOLVED

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954 (50 U. S. C. 841), the Act of September 2, 1957 (18 U. S. C. 3500), and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861, 1864) are set forth in the Appendix *infra*, pp. 1a-9a.

STATEMENT

The petitioner has not been accused or convicted of helping to organize the Communist Party, of advocating the overthrow of the United States Government by force and violence, or of conspiring for such purposes. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (R. A2),[1] returned November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocate overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party: that he knew the Party to be a group of persons who advocated violent overthrow; and that he intended "to bring about such overthrow by force and violence as speedily as circumstances would permit."

The petitioner was first tried in April 1955. He was found guilty and sentenced to imprisonment for six years. That judgment was affirmed by the Court of Appeals for

[1]References designated "R." are to the pages of the printed record herein; those designated "Tr." are to the trial transcript; and those designated "G. Ex." are to the Government's exhibits.

the Fourth Circuit in November 1955, 227 F. 2d 581. This Court granted certiorari, 350 U. S. 992, and heard argument on the constitutional and statutory questions in October 1956. In June 1957 this Court ordered the case restored to the docket for re-argument, 353 U. S. 979. On October 14, 1957, before the case was reached, the Court entered a further order, 355 U. S. 1, reversing the judgment on the authority of *Jencks* v. *United States*, 353 U. S. 657.[2]

After re-argument and denial of a motion to dismiss the indictment, the petitioner was tried again in February 1958. It was conceded by the prosecution, and the trial court so charged (R. A36), that Scales' conduct alleged as criminal had to be committed between November 18, 1951 and November 18, 1954, the three-year period preceding the indictment. It was acknowledged by Scales, and the trial judge so informed the jury (R. A41), that he was a member of the Communist Party within the statutory period.

The prosecution called as witnesses eight ex-Communists, of whom two were *bona fide* and six were Federal Bureau of Investigation informants. Five described Communist Party teachings and activities as known to them, but their testimony did not touch the appellant or Communist activities in the Carolinas. Three had known the appellant as a Party member in North Carolina.

In the former category, the most important witnesses were John Lautner and Barbara Hartle. Lautner, a paid consultant for the Department of Justice, had left the Communist Party in January 1950, nearly two years before the limitations period. He identified books and publications

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[2]This Court made the same disposition of a companion case from the Court of Appeals for the Seventh Circuit, *United States* v. *Lightfoot*, 355 U. S. 2, reversing 228 F. 2d 861. In September the Solicitor General had filed with the Court a memorandum in both the *Scales* and *Lightfoot* cases, confessing error under the *Jencks* case.

used in Communist Party schools, and testified that in such schools in New York City he was taught in 1930 and 1941, and he himself taught in 1947 and 1948, that the ultimate goal of the Communist Party in the United States was "to bring about a fundamental change in the economic, social and political structure of capitalism" (R. 105). He testified (R. 106) that this change "cannot be achieved peaceably" but "will come and can come as a result of force and violence on the part of wresting power [sic] from the capitalist class in this country."

Mrs. Hartle was a member of the Communist Party from 1933 to 1954. Between 1938 and 1946 she had attended two national Party conventions and a Party school in or near New York City, and she was a paid Party official in Seattle from 1940 to the middle of 1950. She testified that during that period she had taught and been taught that the ultimate goal of the Communist Party was "the dictatorship of the proletariat," and that this goal could only be attained "forcibly" (R. 230-31).

Both Lautner (R. 106-07) and Mrs. Hartle (R. 233-34) testified that they had taught and been taught that the Communist goal might be attained at an unspecified future time when the necessary "subjective and objective conditions" would be in existence. Three other witnesses who had joined the Communist Party as paid informants for the F. B. I. also testified about the teaching of the necessity of force and violence as a means of achieving the Party's objectives, as they had observed such teaching in Party schools in Chicago in 1945, in St. Louis in 1947, and in Los Angeles in March, 1951.

None of these five witnesses testified to any acquaintance or contact with or knowledge of the appellant, or to any knowledge of his or of any Party activities in the Carolinas. Most of this testimony was received over defense objection on the grounds of incompetence, irrelevance, and lack of

connection with the defendant. A motion to strike testimony of all these witnesses was denied (Tr. 1828).

The prosecution's leading witness from North Carol was one Clontz, who by pre-arrangement with the F. B made contact with Scales in 1948 and joined the Commu Party in 1950. Two of Clontz' conversations with Sc (R. 246-47 and 263-64) were heavily relied on by prosecution to show Scales' personal knowledge of Party's advocacy of force and violence. These talks all of Clontz' contacts with Scales took place before statutory period of limitations, as the two did not again after September, 1951 (R. 301 and Tr. 1128).

Clontz also identified several books and pamphlets ceived by him from Scales (R. A7-A14 and A18-A23; 310-13; Tr. 1794-1827; G. Exs. 64, 65, and 66) which demned American conduct of the war in Korea. The pro cution offered these documents to show Communist Pa incitement of action in an avowed effort (R. A11-13, A A24) to meet the requirement laid down by this Court the *Yates* case, *supra*. This evidence, some of it hig inflammatory (*infra*, pp. 65-66), was admitted over obj tion. extracts were read to the jury, and the ensuing fense motion for a mistrial was denied (R. A18-A23).

The prosecution witnesses Reavis and Childs were F. B. I. informants and members of the Communist Pa in North Carolina. Childs testified about his attenda at a week-long Party school session held in August, 19 near Winston-Salem, and described (R. 433-42) the va ous types of activity he was directed to engage in as a m ber of the Party, including writing letters to Senators, si ing petitions, distributing leaflets, and obtaining the "ing dients" for mimeographing. Neither Reavis nor Chi testified to any statement or act by Scales or in his prese indicating that Scales personally intended to overthrow Government by force and violence, that he knew the Part aims to be such, or that in fact they were such.

The petitioner did not testify. The defense called nine witnesses who knew Scales during the period when he was a member of the Communist Party, and who described some of his acts and statements during that time and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the petitioner's mother and aunt. None of them had heard the petitioner advocate force and violence, and several testified to his statements and attitudes, heard by and known to them, which were inconsistent or incompatible with such advocacy.

In line with the *Yates* case, *supra*, the trial judge charged the jury (R. A38-A40) that the advocacy of force and violence punishable under the Smith Act is not mere advocacy of belief in violent overthrow of the Government, but must be advocacy of such a nature "as would reasonably and ordinarily be calculated to incite its [the Communist Party's] members to take concrete and forcible action for such overthrow . . ." However, the trial court refused to charge, as requested by the defense (R. A33), that the Smith Act does not prohibit incitement of action specifically protected by the Constitution, such as speeches, leaflets, petitions to public officials, and other recognized means of public persuasion, unless those means are used to advocate the violent and forcible overthrow of the Government. The trial judge also refused to charge (R. A33-34) that the jury could not find the defendant guilty if the activities incited by the Communist Party included *only* such recognized means of public persuasion. Thus the jury was left free to consider, as sufficient evidence of unlawful incitement, the literature dealing with the Korean War and other evidence which was highly prejudicial but wholly irrelevant to the issue of action-inciting advocacy of force and violence.

The jury found the petitioner guilty, and the trial judge again imposed a prison sentence of six years (R. A49).[3] Affirming the judgment of conviction, the Court of Appeals sustained the constitutionality and applicability of the membership clause (R. 456-63) on grounds similar to those invoked upon the previous appeal (227 F. 2d 581, 586-89). The court found no merit in the petitioner's other points, and rejected, expressly or *sub silentio*, his new contentions that the standard of proof of unlawful incitement prescribed in the *Yates* case had not been met, that the membership clause (assuming its intrinsic validity) had been unconstitutionally applied in this case, and that the indictment was fatally defective under the prosecution's new theory that the membership clause applies only to "active" membership.

SUMMARY OF ARGUMENT

I. On its Face, the Membership Clause of the Smith Act is Unconstitutional under the First and Fifth Amendments to the Constitution.

In *Dennis* v. *United States*, 341 U. S. 494, and *Yates* v. *United States*, 354 U. S. 298, this Court upheld the constitutionality of the "advocacy" and "organizing" provisions of the Smith Act in cases where the defendants were charged as conspirators. The Court found basis for this conclusion in the danger flowing from a conspiracy to use the Communist Party as an instrumentality to incite action directed to overthrowing the Government by force and violence. But the "membership clause" requires no proof that the defendant advocated or organized anything or con-

[3] Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act was five years until the Act was amended in July 1956, Scales' sentence is heavier than has been imposed on any other Smith Act defendant.

spired with anyone. It purports to punish a mere status (membership) coupled with a state of mind (knowledge). Such a statute fails to meet the constitutional requirements enunciated in the *Dennis* and *Yates* cases, and was explicitly condemned by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 372-73, 379.

When this case was previously before the Court, the Solicitor-General substantially conceded (Supplemental Memorandum for the United States on Reargument, pp. 3-7) that the membership clause, as written, is unconstitutional. The Government's effort to salvage the clause by amendment, reading in an implied requirement of "activity," would render the clause unconstitutionally vague and is wholly untenable as a matter of statutory construction. The lower court (R. 459) upheld the clause by treating "membership" as identical with "conspiracy", an equation which is contrary to elementary principles of criminal law, and which makes the membership clause a redundant duplicate of the other provisions of the Smith Act.

II. As Applied in this Case, the Membership Clause of the Smith Act is Unconstitutional under the First, Fifth and Sixth Amendments.

In order to satisfy the "action-inciting" requirement stated in the *Yates* case (354 U. S. at 320), at the trial the Government offered books and pamphlets embodying violent attacks on American policy and conduct of the fighting in Korea in 1950. Although wholly unrelated to forcible overthrow of the Government, these documents were received by the trial court as evidence of unlawful incitement. Furthermore, over specific objection (R. A. 33-34), the trial judge left the jury free to consider such evidence *alone* as sufficient proof of incitement. The court below upheld (R. 481) the trial judge on the ground that documents

which tend to "stir up animosity against" the United States are admissible as evidence of unlawful advocacy. Such a view is unprecedented and untenable under the First Amendment and would render all contentious literature on national issues potential proof of seditious advocacy.

Although the indictment contains no such language, the trial judge, at the prosecution's request and over defense objection, charged the jury (R. 41) that the membership clause requires proof that the defendant was an "active" member of the Communist Party. If such a requirement is to be imported by implication in this case, the indictment is fatally defective under the Fifth and Sixth Amendments for lack of essential allegations. *United States* v. *Carll*, 105 U. S. 611. Likewise, the statute is thereby rendered so vague as to violate the Fifth Amendment.

III. The Indictment Fails to State an Offense under the Laws of the United States.

Prosecution of Communist Party members under the membership clause of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither office-holding nor membership in any Communist organization "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." This provision was inserted in order to prevent the registration provisions of the Internal Security Act from being rendered invalid or nugatory by the Fifth Amendment's guarantee against compulsory self-incrimination. The legislative history of Section 4(f) makes it plain that Congress specifically intended to protect Communist Party members and officers against prosecution under the very clause of the Smith Act involved in this case.

The Government's attempted distinction (based on the expression "per se") between "mere membership" and

"membership with knowledge" is untenable. Membership in the Communits Party, without knowledge that the Party espouses violent overthrow, is not punishable under the Smith Act or any other federal statute. Therefore the Government's position makes meaningless surplusage of the phrase "or of any other criminal statute" in Section 4(f). Furthermore, the Government's argument leads to grotesque consequences under the Internal Security Act. If Section 4(f) protects against prosecution only Communists who do *not* know of any violent Party purposes, it would follow that any Communist having such knowledge could avoid compliance with the registration provisions under the privilege against self-incrimination. Whatever may ultimately be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated if construed so narrowly as the Government suggests.

IV. The Evidence is Insufficient to Support Petitioner's Conviction under the Smith Act.

In the *Yates* case, this Court found (354 U. S. at 329) the evidence insufficient to establish that the Communist Party advocated forcible overthrow of the Government in an action-inciting way. Such proof is a necessary element of guilt under the membership clause, as the trial judge properly charged (R. A41). Nevertheless, the prosecution's evidence about the Communist Party was substantially identical with the evidence offered in the *Yates* case (R. A25-A32). The court below wholly ignored this Court's analysis of the evidence about the Communist Party in the *Yates* case and the conclusory summation of the evidence about the Communist Party in the opinion below (R. 477-79) refers to nothing that was not present and relied on by the prosecution in the *Yates* case.

For the requisite proof of the petitioner's unlawful state of mind, the court below relied principally (R. 473-

75) on a few statements made by the petitioner to one of the F. B. I. informant-witnesses in 1949 and 1950, long prior to the limitations period. The statements strongly resemble those held insufficient, as proof of unlawful advocacy, in *Nowak* v. *United States*, 356 U. S. 660, 665-68, and *Maisenberg* v. *United States*, 356 U. S. 670, 672-73. Additionally, the court below relied (R. 478-79) on evidence of the petitioner's general Party activities; under the *Yates* case (354 U. S. at 330) such evidence is insufficient as proof of guilt under the Smith Act.

V. The Petitioner was Denied a Fair Trial.

(A) The grand jury was illegally impanelled. It was never determined whether or not the jury box contained the names of 300 qualified persons, as the statute (28 U. S. C. 1864) requires. *United States* v. *Silverman*, 129 F. Supp. 496. The court clerks and the jury commissioner illegally delegated their duty to select qualified jurors fairly representative of the community. *Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; see *Ballard* v. *United States*, 329 U. S. 187, 195. (B) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived Scales of the opportunity for a fair and impartial trial on the issue of the Communist Party's violent or non-violent aims. In the face of the Congressional "findings" that the Party contemplates resort to force and violence, no jury could determine this question on the basis of an independent and objective scrutiny of the evidence offered in this case. *Cf. Delaney* v. *United States*, 199 F. 2d 107, 112. (C) The trial court denied the petitioner's request to examine the full texts of statements made to agents of the Government by prosecution witnesses. Portions of such statements were withheld

following their examination by the trial judge *in camera*, in accordance with the provisions of Public Law 85-269 (18 U. S. C. 3500), enacted after this Court's decision in *Jencks* v. *United States*, 353 U. S. 657. Under the principles stated in that decision, however, the excision of these portions was a denial of due process. The provisions of 18 U. S. C. 3500 violate the Fifth Amendment in other respects, and their application in the present case violated the Constitutional ban on *ex post facto* legislation. (D) There was highly prejudicial error in the admission of incompetent, irrelevant, remote and inflammatory evidence. The trial was conducted on the apparent assumption that anything ever said or written by any member of the Communist Party was admissible against the petitioner. The entire first half (7 days) of the trial passed before the defendant's name was even mentioned (Tr. 961). The documents (G. Exs. 64, 65 and 66) relating to the Korean War were not only irrelevant to the issues in the case, but highly inflammatory. There was a vast amount of other irrelevant and prejudicial evidence, especially that concerned with the Communist Party doctrine of the so-called "Black Belt" of concentrated Negro population in the South. The trial judge's discretion with respect to the order and scope of proof was abused to a degree that hopelessly prejudiced the petitioner.

ARGUMENT

This case was the first under the "membership clause" to reach this Court. Two of the questions then presented —the constitutionality of the clause and the effect of Section 4 (f) of the Internal Security Act—are inherent in any prosecution under this provision of the Smith Act. In reviewing petitioner's first conviction the Court left these issues unresolved, and they are now presented in this

and at least fourteen other cases pending here[4] and in the lower federal courts.[5]

The defendants in *Dennis* v. *United States*, 341 U. S. 494, were indicted under the membership clause as well as for the conspiracy of which they were convicted. None of them has been tried under the membership indictments, but these have not been dismissed, despite the lapse of ten years.[6] Following the *Dennis* case, there was a series of Smith Act prosecutions, of which two were completed prior to this Court's decision in the *Yates* case. After that decision most of the other conspiracy indictments were dismissed, either by court order or by voluntary action of the government,[8] but one of those cases is now on retrial in Colorado.[9]

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[4]*United States* v. *Noto*, No. 564 Misc., petition for cert. to the Court of Appeals for the Second Circuit filed January 23, 1959.

[5]*United States* v. *Hellman*, pending in the Court of Appeals for the Ninth Circuit; *United States* v. *Lightfoot*, calendered for retrial as No. 54-CR262, N. D. Ill. E. D.; *United States* v. *Blumberg*, pending on motion for new trial, E. D. Pa.; *United States* v. *Russo*, D. Mass.; *United States* v. *Weiss*, N. D. Ill. The other eight cases are those mentioned in footnote 6, *infra*.

[6]The membership indictment against Eugene Dennis is No. C128/89 (S. D. N. Y.), and the other membership indictments are against Winter, Gates, Davis, Hall, Thompson, Foster and Stachel. See *United States* v. *Foster*, 80 F. Supp. 479 (S. D. N. Y. 1948).

[7]*United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), *cert. den.* 348 U. S. 909; *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), *cert. den.* 344 U. S. 922.

[8]The indictments dismissed by court action include *Fujimoto* v. *United States* and *Huff* v. *United States*, 251 F. 2d 342 (C. A. 9); *United States* v. *Silverman*, 248 F. 2d 671 (C. A. 2); *United States* v. *Jackson*, 257 F. 2d 830 (C. A. 2). Indictments dismissed by voluntary action of the government include *United States* v. *Mesarosh*, 352 U. S. 1; *Sentner* v. *United States*, 253 F. 2d 310 (C. A. 8); *Wellman* v. *United States*, 253 F. 2d 601 (C. A. 6). Indictments were dismissed by both court order and voluntary action of the government in the *Yates* case and in *United States* v. *Kuzma*, 249 F. 2d 619 (C. A. 3).

[9]*Bary* v. *United States*, 248 F. 2d 201 (C. A. 10).

The instant case is one of seven prosecutions[10] under the membership clause instituted by the government since 1953. The case returns here with new issues, and old ones sharpened, as a result of the prosecution's attempt to meet the standards of essential proof under the Smith Act as set forth by this Court in the *Yates* case.

I.

ON ITS FACE, THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS UNCONSTITUTIONAL UNDER THE FIRST AND FIFTH AMENDMENTS.

As a matter of judicial policy, this Court does not decide constitutional questions unless the posture of other issues in a particular case requires that the constitutional question be confronted. *Peters* v. *Hobby*, 349 U. S. 331; *United States* v. *Rumely*, 345 U. S. 41. In the present case, there are important non-constitutional issues the disposition of which, the petitioner believes, will in any event require reversal of the decision below and direction of a judgment of acquittal or dismissal of the indictment. But the constitutional and non-constitutional problems overlap, and the case can perhaps be most clearly presented by starting with the background and legal characteristics of the membership clause, and the constitutional questions it raises.

A. Historical Background of the Membership Clause

"Guilt is personal", but to say this is to state the problem, not to answer it. The law has long grappled with the question of what degree of association with a crime is sufficient to establish that the individual so associated may fairly be charged with guilt. Out of this enduring prob-

[10]These are the six cases cited in notes 4 and 5 *supra*, and *United States* v. *Blum* (S. D. Ind.), in which the indictment was dismissed before trial.

lem have developed the legal principles relating to principals and accessories, felony murders, attempts, and conspiracies.

This case involves the associative concept of "membership", familiar in the field of corporations, trade unions, and other aspects of civil law and litigation. But as a criminal concept it is unknown to the common law, and only rarely and in times of great political or economic stress have legislatures undertaken to attach criminal consequences to membership in a group, without reference to some act or concert for purposes of action, such as conspiracy, upon which criminal liability has always depended. Thus in 1799, when Britain was wracked by the Napoleonic wars as well as by the reform movement and other political crises, Parliament enacted the Unlawful Societies Act,[11] which condemned certain societies by name,[12] as dangerous to "the existence of regular government", and provided that "every person who . . . shall become a member of any such society . . . shall be deemed guilty of an unlawful combination and confederacy."

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[11]39 Geo. 3 c. 79. This statute had been preceded in 1797 by the Unlawful Oaths Act, 37 Geo. 3 c. 123, which proscribed the formation of societies bound by oaths of secrecy. The 1799 statute was closely linked in mutual influence and stimulus with our own Alien and Sedition Acts. See Dauer, *The Adams Federalists* (1953) pp. 157-59; J. M. Smith, *Freedom's Fetters* (1956) p. 67.

[12]The preamble to The Unlawful Societies Act embodies a Parliamentary "finding", not unlike the Congressional findings in the Communist Control Act (50 U. S. C. 841) and the Internal Security Act (50 U. S. C. 781), of the existence of "a traitorous conspiracy . . . in conjunction with the persons from time to time exercising the powers of government in France, to overturn the laws, constitution and government . . . both in Great Britain and Ireland, and to dissolve the connection between the two kingdoms", and of "divers societies of a new and dangerous nature, inconsistent with publick tranquillity and with the existence of regular government, particularly certain societies calling themselves Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and the London Corresponding Society . . ." which it was the purpose of the Act to suppress.

Another British statute containing a similar provision, enacted in 1817, was directed against societies bound by oaths of secrecy.[13] Apparently prosecutions under these enactments were very infrequent, although as late as 1834 they were invoked against societies of workingmen such as those from which the trade unions were developing.[14] At all events when, a century later, the paramilitary activities of Sir Oswald Moseley's uniformed adherents assumed proportions thought to be dangerous, Parliament's remedial legislation did not undertake to punish membership in the Moseley organization.[15]

In the United States, "membership" as the basis for penal sanctions first assumed importance with the enactment, early in this century, of numerous state statutes punishing "criminal anarchy" and "criminal syndicalism". The New York statute of 1909,[16] sustained by this Court in *Gitlow* v. *New York*, 268 U. S. 652, contains a provision (not involved in the *Gitlow* case) punishing any person who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group, or assembly of persons formed to advocate" criminal anarchy. The criminal syndicalism and related state statutes passed immediately following the First World War also commonly con-

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[13]The Seditious Meetings Act, 57 Geo. 3 c. 19.

[14]*Rex* v. *Lovelass*, 6 Carr. & Payne 596; *Rex* v. *Dixon*, 6 Carr. & Payne 601 (involving the Cordwainer's Union of Cambridge). Both are *nisi prius* decisions, the first under The Unlawful Oaths Act of 1797 and the latter under The Seditious Meetings Act of 1817. No reported cases under The Unlawful Societies Act of 1799 have been found.

[15]The Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6 c. 6, prohibits quasi-military organizations that organize and train to use force for the achievement of political ends. It is made a criminal offense to take part in the control or management of any such organization, or in the training of its members, but the accused is allowed to show as a defense that "he neither consented to nor connived at the organization ... in contravention of the provisions of this section."

[16]Laws 1909, c. 88, now sections 160-66 of the Penal Law.

tained clauses specifically directed against being or becoming a member of any group or organization espousing the teachings against which the statutes were directed.[17]

The California criminal syndicalism statute[18] came before this Court in *Burns* v. *United States*, 274 U. S. 328 and *Whitney* v. *California*, 274 U. S. 357, and the Kansas statute in *Fiske* v. *Kansas*, 274 U. S. 380. As applied to the facts of each case, the California law was held constitutional and the Kansas Law unconstitutional. None of the three is governing here, because (although both laws punish membership in an organization advocating criminal syndicalism) none of the defendants was indicted for membership alone, but also for organizing the group in question.[19] In the *Whitney* case, however, Justice Brandeis (in whose opinion[20] Justice Holmes concurred) noted the extraordinary reach of the California statute's membership clause, questioned its constitutional validity, and concurred in the Court's decision only because the defendant had not raised the "clear and present danger" question in the state court, and because there was evidence linking the defendant not only with syndicalist doctrine but also with "a conspiracy . . . to commit present serious crimes."[21]

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[17]See, e.g., the statutes involved in *People* v. *Steelik*, 187 Cal. 361, 203 Pac. 78 (1921); *State* v. *Dingman*, 37 Ida. 253, 219 Pac. 760 (1923); *People* v. *Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922); *State* v. *Tonn*, 195 Ia. 94, 191 N. W. 530 (1923); *State* v. *Berquist*, 109 Kan. 368, 199 Pac. 101 (1921); *State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958 (1922); *Commonwealth* v. *Blankenstein*, 81 Pa. Sup. Ct. 340 (1923); *State* v. *Hennessey*, 114 Wash. 351, 195 Pac. 211 (1921). In a few of these decisions the membership clause as distinguished from the more orthodox provisions, was considered and upheld. *State* v. *Hennessey, supra; State* v. *Laundy, supra.* In others its validity was doubted. *People* v. *Lloyd, supra, State* v. *Tonn, supra.*

[18]California Statutes 1919, c. 188, Deering's Penal Code (1949), pp. 773-74.

[19]In both the *Fiske* and *Burns* cases the group was the Industrial Workers of the World; in the *Whitney* case it was the Communist Labor Party of California.

[20]*See Whitney* v. *California, supra,* at pp. 372-80.

[21]*Id.*, at 379-80. See also the *Dennis* case at pp. 513-14.

The similarity between the Smith Act and the New York criminal anarchy statute was noted in the *Dennis* case,[22] and it may reasonably be assumed[23] that the inclusion of the membership clause in the Smith Act is due to the presence of comparable clauses in the state statutes that antedated it by twenty to thirty years. However, there is one significant respect in which the Smith Act clause differs from its New York state predecessor, for the former alone requires knowledge of the Party's unlawful purposes as an element of the offense[24]—a provision added by a Senate amendment to the original bill, which did not require such knowledge.[25]

B. Constitutional Limits on the Scope of the Smith Act

The Smith Act proscribes advocacy of overthrowing the Government by force or violence whether by personal exhortation, printing and disseminating literature, or organizing or joining groups engaging in such advocacy. In the *Dennis* case, this Court upheld the constitutionality of the advocating and organizing provisions, subject to specific limitations laid down in the Court's opinion as necessary to sustain the constitutionality of the Act under the First Amendment.

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[22]See the *Dennis* case at pp. 536 and 562, n. 2.

[23]The legislative history of the Smith Act is silent on the source of the membership clause.

[24]In this respect the Smith Act membership clause resembles the California criminal syndicalism law, which specifies "knowingly" as an element of criminal membership, and differs from the Iowa, Washington, and Oregon statutes, which do not. See the *Laundy* and *Hennessey* cases, *supra*, note 17.

[25]H. R. 5138 (76 Cong., 1st sess.). This bill, introduced by Representative Howard Smith of Virginia, was passed by the House on July 29, 1939 (84 Cong. Rec. 10451-56). It was redrawn in the Senate Committee on the Judiciary, and as amended (with the requirement of knowledge added to the membership clause) it passed the Senate on June 15, 1940 (86 Cong. Rec. 8340-47). The bill was enacted into law as amended.

All of the opinions in the *Dennis* case, including Judge Learned Hand's opinion below[26], are pregnant with awareness that the case presented a problem quite different from what was involved in the *Schenck, Gitlow,* and other free speech cases of the post-World War I years. On the one hand imminent (i.e. "present") peril of violent overthrow of the government (the "substantive evil") was, on the record in the *Dennis* case, totally unproved. On the other hand the potential ultimate (i.e. "clear") danger of such overthrow was inferred from the Communist Party's doctrine, leadership, organization, and activities both in the United States and abroad.

The clear and present danger in the *Dennis* case was not the conspiratorial activities, standing alone, of the handful of defendants. Nor was it the Communist Party itself, which was not even under indictment. The danger in the *Dennis* case was the conspiracy of the defendants to advocate and bring about violent overthrow of our Government through and by means of the Communist Party. It was the defendants' concerted and violent objectives *coupled with* the potent instrumentality utilized for their achievement, that was the basis of Judge Medina's finding (approved by both the Court of Appeals and this Court)[27] that "there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

In Smith Act conspiracy prosecutions, therefore, the impact of the "clear and present danger" rule is to require a *nexus* between the conspirators' violent intent and an instrumentality proportioned to the magnitude of the objective. Conspiracies to obstruct the draft or impede war production may achieve their purpose, at least in part, with

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[26] *United States* v. *Dennis,* 183 F. 2d 201.

[27] See 182 F. 2d at 215-216 and 341 U. S. at 511-515.

relatively modest means. But overthrowing the United States Government is no job for boys. Unless conspirators to this end have laid hold of some engine or organization powerful enough to give cause for alarm under Judge Learned Hand's restatement of Justice Holmes' rule,[28] their conspiracy to adocate force and violence is not constitutionally punishable under the Smith Act.

In the free speech cases under the Espionage Act it was quite clear that the defendants were directly and personally responsible for whatever degree of danger had been caused. For example, when Eugene V. Debs made a speech praising those who violated the military draft laws, the danger of the "substantive evil" was directly traceable to Debs, and the only question was whether it was "present" enough. Since even a single speech might "bring about the substantive evil" of obstructing military service, Deb's conviction was upheld. *Debs* v. *United States*, 249 U. S. 211.

But if Debs (or Schenck or Gitlow) had made a speech advocating that the Government be overthrown by force, under the *Dennis* case there would have been no constitutionally punishable offense, because (in Chief Justice Vinson's phrase, 341 U. S. at 516) there would have been no "power to bring about the evil" of violent overthrow.[29] Indeed, it is hard to see how (short of war) this particular "substantive evil" can become a "clear and present danger" unless by an organization, such as the Communist Party, of such ideological and numerical dimensions that it merits description as a "movement".

Thus the Smith Act Communist prosecutions are the exact converse of the *Debs* case. There the personal respon-

[28]See 341 U. S. at 510 and 183 F. 2d at 212.

[29]See also Justice Frankfurter's concurring opinion in the *Dennis* case at p. 542: "Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*".

sibility is plain, but the limited power of evil is sufficient to create a danger only if the objective is a relatively narrow one. In the Smith Act cases the Communist Party (if there is judicially satisfactory proof) supplies the power to create the danger of violent overthrow, and the question of personal responsibility at once emerges as the crucial issue.

It is in the light of these considerations that the factors specified in the *Dennis* case, as constitutionally necessary elements of guilt under the Smith Act, must be viewed. These elements are not haphazard; on the contrary, they sharply reflect the real problems of national security, personal liberty, and individual responsibility that necessarily attach to prosecutions of Communists under our constitutional system. There are three specific requirements stated in the *Dennis* case which bear on the constitutionality of the membership clause.

(1) *Conspiratorial Power.* In view of immensity of the "substantive evil" against which the Smith Act is directed, it is absurd to think of a "clear and present danger" caused by an individual. Governments are not overthrown by individuals, but by conspiracies, juntas, and movements. "It is the existence of the conspiracy which creates the danger", as Chief Justice Vinson wrote in the *Dennis* case (at p. 511), while Justice Jackson observed (at p. 577): "There is no constitutional right to 'gang up' on the Government." It is the conjunction of the conspiracy to destroy the government with the strong instrumentality of the Communist Party (assuming that the Party's similar purpose has been established) that constitutes the clear and present danger, as all of the majority opinions in the *Dennis* case (341 U. S. at 498, 511, 546-48, 564-66) make clear.

To support a Smith Act conviction of Communists therefore, the accused must be shown to have been so connected with the Party that they could exploit its power to

bring about the "substantive evil" of violent overthrow. Guilty activity in and through the Party must, as was ruled in the *Dennis* case (at p. 516), be such as to establish not only the defendants' evil intent but also that "the nature of their activities" and "their power to bring about the evil" are so great as to justify a determination that their conspiracy created a "clear and present danger" to national security.

(2) *Incitement.* The substantive offense punished by the Smith Act is not discussion, but advocacy of action. In the *Dennis* case, the Court showed great concern (341 U. S. at 501-02, 544-46, and 572) that the Act be not construed to penalize the exposition and analysis of ideas, however unpopular, and Justice Frankfurter noted (341 U. S. at 545) that: "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." At the trial, Judge Medina instructed the jury to determine whether the defendants conspired to advocate violent overthrow "by language reasonably and ordinarily calculated to incite persons to such action." In the *Yates* case where no such instruction had been given, the Court, in order to avoid (354 U. S. at 319) "a constitutional danger zone so clearly marked", construed the Smith Act as limited to advocacy which incites the hearer to take action—"to *do* something, now or in the future, rather than merely to *believe* in something"— directed toward the violent overthrow of the government.

(3) *Personal Intent to Overthrow the Government.* This was likewise specified in the *Dennis* case (341 U. S. at 499-500 and 516) as a constitutional element of Smith Act guilt. Furthermore, the intent is insufficient if it relates to the indefinite future; under the *Dennis* case (341 U. S. at 511-12) it must be an intent to overthrow the government "as speedily as circumstances would permit."

It is perhaps only theoretically possible that an individual Communist might intend to overthrow the Government but remain ignorant of the Party's program. But it is both theoretically possible and practically certain that one—indeed many—who know the Party program may lack the specific intent. The undercover agent who joins the Party to report its personnel and activities to the Government presumably knows the Party's illegal purposes, but lacks intent. The individual who joins the Party because he believes it to be an effective avenue for the achievement of some socio-economic goal such as unionization or the abolition of racial restrictions, may be entirely lacking in violent or unlawful intent of any kind, whether or not he knows of the Party leadership's subversive purposes.

C. Constitutional Deficiency of the Membership Clause Under the First and Fifth Amendments

The constitutionality of the membership clause on its face must be determined on the basis of the clause and what is charged in the indictment, not the proof offered thereunder. For all that apears from the indictment under which Scales was convicted, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members. There is no charge that he ever heard anyone advocate the overthrow of the Government, much less that he himself ever engaged in such advocacy. There is no charge that he ever engaged in any Party activity.

No concert of action or intention with any other person is charged against Scales. Indeed, no act of any kind whatsoever is charged; the accusation is purely one of status (membership) and state of mind. There is no charge that Scales, alone or in collaboration with any one else, ever planned or contemplated that violent overthrow would be advocated by anyone; *a fortiori* the indictment does not

charge that such advocacy would be in language calculated to incite other persons to unlawful action.

In short, the indictment charges nothing more than a state of mind comprising knowledge and intent,[30] manifested in the external world by nothing more than non-conspiratorial membership in the Communist Party, unsupported by any charge of Party contacts or activities. "The thought of man shall not be tried," said Chief Justice Brian in Y. B. 7 Edw. IV, f. 2, pl. 2, "for the devil himself knoweth not the thought of man." It is too plain for argument that such a charge wholly fails to satisfy the requirements stated in the *Dennis* case, and violates the First Amendment of the Constitution.

During argument when this case was last here, question was raised from the bench concerning the bearing of *Bryant* v. *Zimmerman*, 278 U. S. 63. That case involved a New York statute requiring associations, in which the taking of an oath is a condition of membership, to file reports with the Secretary of State. The statute makes it a misdemeanor to remain a member of such a society with knowledge that it has failed to file reports required by the law.

The *Bryant* decision does not support the constitutionality of the membership clause. The statute there in ques-

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[30]The membership clause does not specify intent as an element of the offense, but intent is charged in the indictment here. Of course, if the membership clause is constitutionally defective for this reason the defect cannot be cured by adding a superfluous allegation to the indictment. *Thornhill* v. *Alabama*, 318 U. S. 88. Inasmuch as Congress amended the bill that became the membership clause by adding a requirement of knowledge, but did not add a requirement of intent, it is at least doubtful that intent may be read by implication into that clause. In the *Dennis* case it was held (341 U. S. at 499-500) that the inherent nature of advocating or organizing for the violent overthrow of government is such as to require "the inclusion of intent as an element of the crime" even if not so specified in the statute. But this is not true of membership, which may be of an entirely passive nature involving no action from which intent might reasonably be inferred. However, even if intent were to be read by implication into the membership clause, its constitutionality would not thereby be saved.

tion does not suppress or penalize membership in the societies to which the law applies. It is a registration measure, and its only sanctions are directed not at membership, but at failure to register. The principal issue raised by the *Bryant* case was the reasonableness of the statutory classification.[31] Societies bound by secret oaths have in the past been the subject of regulatory legislation,[32] and on this basis the law was upheld. But the Smith Act and its comparable state predecessors undertake to punish membership itself, and it is noteworthy that earlier efforts directed to this end failed.[33]

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[31]The New York statute, enacted in 1923, was directed at the Ku Klux Klan. The *Bryant* case was recently discussed in *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 465-66.

[32]*Cf.* the British statute of 1817, *supra* p. 17. In the United States, in addition to the Klan, the Masons have been the main object of legislative scrutiny. See McCarthy, *The Anti-Masonic Party: A Study of Political Anti-Masonry in the United States 1827-1840*, in the Annual Report for 1902 of the American Historical Association, vol. I, p. 365. In 1833 and 1834 respectively, Vermont and Massachusetts passed laws prohibiting any person from taking or administering any oath other than as required or authorized by law. Vermont Public Acts 1833 c. 20; Laws of Massachusetts 1834; *cf. Strickland* v. *Prichard*, 37 Vt. 324 (1863).

[33]According to McCarthy, *op. cit. supra* note 32 at pp. 513-53, the anti-Masonic bills introduced in Vermont, Massachusetts, and Rhode Island were prohibitory and far more drastic than the laws as enacted. In Pennsylvania, Thaddeus Stevens in December 1835 reported a bill to the legislature entitled "An Act to Suppress Secret Societies Bound Together by Unlawful Oaths". McCarthy, *supra*, p. 473; Woodbine, *The Life of Thaddeus Stevens* (1913) pp. 22-25. In response to Stevens' inquiries to the then leading presidential aspirants, Daniel Webster approved a prohibition of secret oaths. But William Henry Harrison, while acknowledging that Masonry might be "a proper subject for the deliberation and action of some of the constituted authorities of our country", rejected the proposed prohibitory legislation, saying that he was "certain that there exists no such power either in the whole government of the United States or of any of its departments, and that the attempt to exercise it would constitute a usurpation of power, pregnant, if tolerated by the people, with mischiefs infinitely more fatal than those which it was intended to remedy." McCarthy, *supra*, pp. 473-79; *The Pennsylvania Reporter and Democratic Herald* (Harrisburg, Jan. 8, 1836) p. 2 col. 2. Stevens' bill failed of enactment by the Pennsylvania legislature.

In weighing the constitutionality of the membership clause, the Fifth Amendment must be considered as well as the First. No more than many others is the phrase "guilt by association" self-defining, but it is not meaningless. Its meaning is not abstruse: a man may be held criminally liable only for his own conduct, or for the conduct of others in some form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants. "Membership" is not such a recognized combination. Joint participation in a felony is, and so is conspiracy. But courts and legislatures alike have remained awake to the dangers of injustice that surround imputed guilt, and have erected a variety of safeguards against oppressive consequences.

To attach criminal consequence to "membership", unaccompanied by act or declarations that might bring the charge within the ambit of associative concepts known to our law, would so far extend the notion of imputed guilt as plainly to violate the due process clause of the Fifth Amendment[34] and, in the circumstances of this case, the First Amendment as well. The "dangers to the liberty of the individuals and the integrity of the judicial processes that are inherent in conspiracy charges" were strongly delineated by the late Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, at 457. But at least the dangers of the conspiracy concept are known to and limited by judicial practice.

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[34] John Lord O'Brian, *National Security and Individual Freedom* (1955), at p. 27-28:

> "The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

In essence, the membership clause seeks to hold a "member" of a group criminally liable for the group's "advocacy," whether or not the member participated in the advocacy. A co-conspirator or joint participant in a felony may be held liable for the acts of others, but it has not yet been held under our Constitution that "membership" is a form of association which warrants holding one member criminally responsible for the acts of others. Such a statute is a flagrant abridgement of freedom of speech and assembly, denies due process of law by the unwarranted imputation of guilt, and is void by every criterion of the First and Fifth Amendments.

The court below sustained the constitutionality of the membership clause by resorting to alchemy (R. 459): "The membership clause is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." But the clause is both more and less than, and very different from, a statute so described.[35]

In a conspiracy case, the conspirators (two or more)[35a] must be identified, and the prosecution must prove an agreement among them "to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy". *United States* v. *Falcone*, 311 U. S. 205, 210. Assistance and support even to those known to be engaged in crime does not establish conspiracy with them.

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[35]Apart from the matters mentioned in the text, neither the membership clause nor any other part of the Smith Act proscribes "a conspiracy to overthrow the government" (an offense covered by a statute nearly a century old, now 18 U. S. C. 2384), but rather *advocacy* of governmental overthrow, whether orally or by the printed word. More important, the lower court's treatment of the membership clause renders it indistinguishable from the other provisions of the Smith Act, and therefore cannot possibly be sustained on elementary principles of statutory construction.

[35a]*United States* v. *Rabinowich*, 238 U. S. 78, 88; Pulton, *De Pace Regis et Regni* (London, 1615) pp. 232-33. Under the federal conspiracy statute, overt acts must also be charged in the indictment.

lacking any agreement to pursue the unlawful ends. *United States* v. *Falcone, supra; Butler* v. *United States,* 197 F. 2d 561 (C. A. 10). Nor does unlawful intent satisfy the requirements, for:[36]

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself. . . ."

But the charge against Scales covers no agreement or plot of any kind. It rests solely on knowledge and intent (assuming that intent is read into the clause).[37] In a conspiracy there must be evidence of affirmative conduct by the defendant in aid of the criminal agreement among the parties—what Justice Rutledge called "informed and interested cooperation, stimulation, instigation." See *Direct Sales Co.* v. *United States,* 319 U. S. 703, 713. As Judge Learned Hand has put it, a conspirator "must in some sense promote . . . [the] venture himself, make it his own, have a stake in its outcome." *United States* v. *Falcone,* 109 F. 2d 579, 581 (C. C. A. 2); see also *United States* v. *American Precision Products Corp.,* 115 F. Supp. 823, 826 (D. N. J.). But nothing like this has been charged against Scales.

It is true that in the opinion of this Court in *Whitney* v. *California,* 274 U. S. 357, 371-72 the California criminal syndicalism statute, proscribing membership in or the organization of such groups, was described as partaking "of the nature of a criminal conspiracy." But the defendant in the *Whitney* case was not, as is the petitioner here, indicted for membership alone. In Mr. Justice Brandeis' concurring opinion (in which Mr. Justice Holmes joined)

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[36] *Mulcahy* v. *Regina,* L. R. 3 H. of L. 306, 317 (1868).
[37] *Supra,* p. 25, note 30.

it is pointed out (274 U. S. at 379) that the defendant there had failed to challenge the California statute under the "clear and present danger" test, and that there was evidence linking her with "a conspiracy . . . to commit present serious crimes" quite distinct from advocacy. Justice Brandeis went on to point out the difference between a "membership" charge and a "conspiracy" charge, and indicated that, if the constitutional issue were properly raised, the California "membership" clause should be held void[38] (274 U. S. at 372-73, 379):

> "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.
>
> ". . . I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment . . ."

The view taken below is equally untenable as a matter of statutory construction. If membership is indeed "noth-

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[38] *Cf.* the line of cases invalidating state statutes such as one which undertook to punish "associating with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers and gamblers . . .". *The City of St. Louis* v. *Roche*, 128 Mo. 541, 31 S. W. 915; *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628.

ing more or less than" conspiracy, then the membership clause adds nothing to the other provisions of the Smith Act. Under elementary principles, statutory provisions should not be construed so as to render them redundant duplicates of others. The result in the present case has been to use the membership clause as a device for convicting Scales of conspiracy without meeting the established requirements of that offense.

The same vice of redundancy inheres in the Government's efforts to salvage the unconstitutionality of the clause by judicial amendment. At no time has the prosecution even attempted to apply the clause, as written. For the indictment itself adds the charge of personal intent, which the statutory language does not embrace. But even assuming that intent may rightly be read into the clause by implication,[39] the other constitutional requirements set forth in the *Dennis* and *Yates* cases are still lacking.

When this case was previously before the Court, the Solicitor General substantially conceded that the clause as drawn is unconstitutional, and he sought to support it by dint of drastic qualifications and limitations, which he asked the Court to read into the clause. After the *Yates* decision, for example, the Solicitor General proposed to construe the membership clause as applying only to "active" membership.[40] The rationale of this proposal is obscure, as the

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[39] *Supra*, p. 25, note 30.

[40] Supplemental Memorandum for the United States on reargument in *Scales* v. *United States* and *Lightfoot* v. *United States*, Nos. 3 and 4, October Term, 1957, at p. 3. Therein the Solicitor General first suggested that "activity" should be determined not by the jury but by the trial judge, in the manner of "clear and present danger". Perhaps sensing the fragility of this theory, the Solicitor General (Supplemental Memorandum, pp. 5-7) fell back to the position that "activity" be made an element to be found by the jury, and proposed the instruction that should be given. As described below (*infra*, pp. 41-43), at Scales' trial the prosecution followed this second course of action.

Yates case itself holds that "activity" is not the test of criminality under the Smith Act. The five defendants whose acquittal was there ordered (354 U. S. at 330) had been exceedingly "active" in the Communist Party. But they were not shown to have ever engaged in other than "wholly lawful activities", and in terms of the First Amendment some kinds of activity may be significant and others completely irrelevant. To read the word "active" into the membership clause, therefore, adds nothing of significance for purposes of the First Amendment, and merely renders the clause vague, and correspondingly vulnerable under the Fifth Amendment.

And so, after grafting intent and "activity" onto the membership clause, the Government sought to make it encompass the characteristics of conspiracy as well, arguing[41] that it applies to "high-level" membership, to "tightly disciplined, quasi-military, deeply conspiratorial activities", and to "the concert-of-action, combination, and acting-together which characterize conspiracy". But this reduces the Government's case to absurdity, for the language of the clause is thus used as a mere pedestal on which to erect an elaborate structure of descriptive limitation which finds no support in the wording or purpose of the clause and like the lower court's spurious equation of membership with conspiracy, renders the clause merely duplicative of the Smith Act's other provisions.

Such strained contentions make a mockery of all principles of legislative construction. That the Government resorts to them reflects the hopeless nature of its dilemma. The membership clause is unconstitutional as written, and efforts to save it by judicial amendment must fail either for inadequacy or as rendering the clause meaningless and redundant surplusage in the Smith Act.

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[41]Brief for the United States in *Scales* v. *United States*, No. 29, October Term, 1956, at p. 45.

This Court has held that past membership in the Communist Party is no basis for refusing admission to the bar, and does not support an inference of bad character. *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar*, 353 U. S. 252. If Party membership is a sign of "wooly mind or naive notions regarding the problems of society" (353 U. S. at 250-51), still that is hardly a sufficient basis for conviction of felony under the laws of the United States, and a sentence of six years' imprisonment.

II. AS APPLIED IN THIS CASE, THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS UNCONSTITUTIONAL UNDER THE FIRST, FIFTH AND SIXTH AMENDMENTS.

If the membership clause be assumed constitutional on its face, the question follows whether it is constitutional as applied in this case. In the *Dennis* case, the Court explicitly recognized (341 U. S. at 514-16) that the Smith Act may be constitutionally fair in one application but foul in another.

A. Unconstitutionality Under the First and Fifth Amendments

The facts which the prosecution sought to establish by the evidence it offered on the second trial of this case were avowedly (R. A10-A13) selected with an eye to the standards of proof laid down by this Court in the *Yates* case. Under those standards, advocacy of forcible overthrow is punishable under the Smith Act only (354 U. S. at 312, 320) if the advocacy is of such a nature as to "incite" persons to take "concrete action for the forcible overthrow of government."

At the trial, however, the prosecution and the court put an erroneous construction on this requirement. The prosecution saw only the words "concrete action," and ignored or overlooked the qualifying phrase "for the forci-

ble overthrow of government." As a result, the prosecution took the position that proof of Communist Party incitement to action of *any kind* would be relevant to the case and sufficient to meet the standard of proof prescribed in the *Yates* case.

The prosecution's theory was first articulated when it offered in evidence a copy of the publication *Textile Workers' Voice*, together with testimony that if was a Communist Party organ and had been given by the defendant to the witness then on the stand (R. A7-A9 and 310-11; Tr. 1132-35). The witness then read to the jury (R. A8-A9) a long extract from the April, 1949 issue attacking the Atlantic Pact and the Truman Administration, and urging readers to write to Senators Hoey and Graham and ask them to vote against "this war pact." In reply to a defense motion to strike, the prosecuting attorney stated (R. A-9): ". . . it is directly linked with the defendant and it carries with it what we call his language which incites to action. It is urging action either now or in the future. 'Write to your Senators.' It expresses the desire of the Communist Party, and we think the language itself is inciting to action."

At the time of offer, the trial Judge reserved ruling on the admissibility of this and half a dozen similar documents (R. A13-A14; Tr. 1676 and 1705). In the course of argument, prosecution counsel repeated their contention that publications urging readers to write to Congressmen embodied "language that tends to incite and urges action likewise" (R. A11 and A13), and argued generally that Communist "propaganda" in opposition to United States policy in Korea "was one of the action campaigns of the Party" (R. A13; Tr. 1830). The defense replied that the action "incited" by these articles was patently irrelevant to the issue of forcible overthrow, was therefore not the sort of "action-inciting" advocacy referred to in the *Yates*

case, and that public criticism of foreign policy and writing letters to Congressmen are rights protected by the First Amendment (R. A11-A12; Tr. 1926).

The trial Judge ultimately excluded four and admitted three of the contested documents.[42] The prosecuting attorney then read to the jury long extracts (R. A18-A22; Tr. 1807-27) from the three admitted documents (G. Exs. 64, 65 and 66). All three were violent attacks on United States actions and policies in Korea. None of them contains any reference whatever to force and violence as a means of effecting political change or bringing about a Communist regime in the United States; all were totally irrelevant to the issue before the jury. One of the extracts (G. Ex. 66, R. A20-22) is so blood-curdling and calculated to inflame an American jury with passion and hatred against its authors, or anyone distributing it, that the defense promptly but unsuccessfully moved for a mistrial (R. A23; *infra* pp. 65-66). The prosecuting attorney singled out these documents for special attention by the jury (R. A22 and A24), and in his summation urged the jury to look at the most inflammatory document (G. Ex. 66) "and see whether there is language in that exhibit that would incite you to action" (R. A24).

The prosecution offered other evidence of "action" which was similarly irrelevant and objectionable. For example, the Government attorneys laid stress (R. A10; Tr. 1139) on Mrs. Hartle's testimony about the Communist Party's public opposition to American participation in the Korean War.

The defense requested the trial Judge to charge the jury (R. A33-A34) that (a) the "action for the forcible overthrow of the government" referred to in the *Yates* case does not include constitutionally protected activities such as

[42] R. A18. The judge did not state the grounds of his decision, or his reasons for distinguishing among the documents.

speaking, publishing, or writing letters to public officials, unless those means of public persuasion are used to advocate forcible overthrow of the government, and (b) the defendant could not be found guilty "if the activities incited by the Communist Party include only such means of public persuasion as are used to voice opinions on public issues of foreign and domestic policy, no matter how unpopular or odious to the majority of American citizens those opinions may be." The prosecution objected, and the court refused to give the instruction (Tr. 1926 and 1937).

Thus the constitutional issue is sharply posed. Can the Smith Act be constitutionally applied to punish advocacy of violent overthrow of government (whether through membership in an organization, as here, or by conspiratorial or individual participation), on the basis of evidence of advocacy that incites people to action by way of speech, press, petition, or assembly, which is vehemently critical of governmental policy and actions, but which does not advocate or incite action directed to forcible overthrow of the government?

To answer this question in the affirmative, the Government must take the position that, if violent overthrow is part of the "abstract theory" or "doctrinal" paraphernalia of the Communist Party (354 U. S. at 312-21), then any kind of action which the Party incites—even if wholly lawful and specifically protected by the First Amendment—is action-inciting advocacy within the meaning of the *Yates* case. But in fact the *Yates* case explicitly holds the reverse of this proposition. It holds that the action incited must be (354 U. S. at 320) "for the forcible overthrow of the Government."

The Government might reply (R. 1142) that any action incited by the Communist Party will be intended, at least in the long run, to achieve the Party's objective of violent overthrow. But the application of this theory would render

meaningless the standard as applied in the *Yates* case. The five defendants acquitted in the *Yates* case had incited a great deal of action, through speeches soliciting votes for Communist-supported candidates, lectures urging listeners to read Communist literature, and articles and periodicals promoting action in support of or against a wide variety of persons and policies. Nevertheless, their acquittal was ordered by this Court because (354 U. S. at 330-31) the action incited was unrelated to forcible overthrow of the Government, and otherwise "wholly lawful."

If there ever might have been any basis for the Government's theory, it was removed years before the *Yates* case by *De Jonge* v. *Oregon*, 299 U. S. 353 (1937). In that case a Communist Party member was prosecuted under the state statute against criminal syndicalism, for participating in a public meeting called by the Communist Party to protest against police activities during a longshoremen's strike. On appeal to this Court, it was not disputed that the Communist Party did in fact advocate criminal syndicalism—a doctrine defined to include advocacy of force and violence as a means of political change (299 U. S. at 357 and 360). It was likewise agreed that criminal syndicalism was not advocated at the public meeting; the state court had sustained the conviction on the basis that the auspices of the meeting—i.e., a group that advocated criminal syndicalism—rendered participation in the meeting criminal even though the advocacy there engaged in was entirely lawful.

It is plain that the prosecution's theory in the *De Jonge* case was the same as that of the prosecution in the present case: the use of speech, press and assembly to oppose American involvement in Korea is lawful *per se*, but becomes unlawful if the auspices are those of the Communist Party. This theory was, however, unanimously rejected in the *De Jonge* case and the conviction was set aside. In his opinion, Chief Justice Huges pointed out (299 U. S. at

365) that the auspices under which the meeting was held could not constitutionally govern the outcome of the case. For notwithstanding the violent objectives of the Communist Party as found by the Supreme Court of Oregon (299 U. S. at 365-366):

> "... the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty."

This conclusion was specifically reaffirmed by this Court in *Herndon* v. *Lowry*, 301 U. S. 242, 258. See also *Beauharnais* v. *Illinois*, 343 U. S. 250 at 270: "It is when speech becomes an incitement to crime that the right freely to exhort may be abridged." Of course, the action incited need not be violent or criminal standing alone. But it must be in furtherance of crime—in the present case, in furtherance of the forcible overthrow of the Government.

The court below sustained the admissibility of this evidence (R. 480-81) on the ground that it was "clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted." But this conclusion is quite untenable under the principle of the *De Jonge* case, *supra*.

Furthermore, the grave dangers of such a view are easily perceptible. It would render all contentious literature on national issues potential proof of seditious advocacy. There are several issues dividing our country today, involving arguments and accusations that may well "blacken" and "stir up animosity against" the government. If the projection of such arguments in published form may now be taken as evidence of incitement to action for overthrowing

the government by violence, there is little substance left in the First Amendment.

But even if the lower court's view be accepted, the petitioner was gravely prejudiced by the trial judge's refusal to instruct the jury that they could not find the defendant guilty on the basis of such evidence *alone* (R. A33-A34; Tr. 1926 and 1937). This error was emphatically urged below, but is not touched on in the lower court's opinion. By refusing so to charge, the trial judge left the jury free to find unlawful, action-inciting advocacy on the basis of this evidence alone, irrelevant and inflammatory as it was.

The mere exercise of the constitutionally protected rights of speech, press and assembly to criticize the conduct of national affairs is not "an incitement to crime." It cannot constitutionally be made the basis of a finding of guilt under the Smith Act. In receiving and permitting the jury to consider such evidence sufficient as proof of unlawful *advocacy*, the court below applied the Smith Act in violation of the First Amendment.

During the trial the prosecution offered, and the court admitted over objection, an enormous amount of other incompetent, irrelevant and prejudicial evidence. Five prosecution witnesses, none of whom had any knowledge of the appellant or of any Communist Party activities with which he was connected, filled hundreds of pages of the record with their testimony. The prosecution's proof ranged over an exceedingly broad area, including matters of personal morals, race relations, religion, and other matters possibly pertinent to a doctoral dissertation on the Communist Party, but quite irrelevant to the question of forcible overthrow.

Below (*infra*, pp. 64-71) we discuss these matters as they relate to the fairness of the trial. We there point out that the admission of extensive testimony, concerning statements and activities unknown to and remote in

time and place from the appellant, was both erroneous and highly prejudicial. But these matters also bear directly on the constitutionality of the membership clause as applied in this case.

By the blanket admission of third party declarations through the testimony of witnesses who have been members of the Communist Party, the judgment below has created especially grave perils to free speech. The apparently limitless scope of "evidence" for which the appellant was held answerable has created an extraordinary and dangerous situation. Congress has expressly declared, in accordance with the Constitution, that it is not a crime—indeed it is protected by the Constitutional rights of speech, press, and assembly—to be a member of the Communist Party and participate in its activities. But under evidentiary rulings such as were made below, these rights are exercised only subject to serious and undefined hazards. One may be convicted of violating the Smith Act through the declarations of strangers, living and dead, solely because of their membership and activity in the Communist Party.

The metes and bounds of the Smith Act, in terms of guilt or innocence, are thus rendered so vague and far-reaching as plainly to trespass not only on the First Amendment, but on the due process clause of the Fifth Amendment as well. *Winters* v. *New York*, 333 U. S. 507. The essential elements of the offense punished by the membership clause—"membership" and "advocacy"—are rendered both infinite and amorphous by releasing such a Niagara of evidence to inundate the jury.

Thus the appellant was deprived of any real opportunity to defend himself against the charge of sedition. Other and equally vicious consequences followed as a matter of course, as the range of "admissible evidence" was allowed to stretch ever farther into the past and ever more remote from the accused. The result is that by these evidentiary

rulings, the court below applied the Smith Act in violation of the First and Fifth Amendments.

B. Unconstitutionality Under the Fifth and Sixth Amendments

Under the Sixth Amendment, the accused must be "informed of the nature and cause of the accusation." Under the Fifth Amendment, the vehicle for imparting this information is the indictment. To satisfy these requirements, the indictment must be sufficiently specific to inform the defendant of the nature of the charge, protect him against double jeopardy, and enable the court to determine whether or not the facts stated therein, if proved, would support a conviction. *United States* v. *Cruickshank*, 92 U. S. 557; *Rosen* v. *United States*, 161 U. S. 29.

In the course of the three and a half years since the indictment in the present case issued, it has become clear, and is conceded by the Government, that the facts stated therein do *not* support a conviction. The Government itself requested the trial judge to charge the jury that a criminal offense would not be made out unless it were proved that the defendant was an "active" member of the Communist Party, although the indictment says nothing about this matter, which has now been treated as an essential element of the offense. Appellant questions the correctness of this ruling but, correct or not, there has certainly been an amendment of the indictment by judicial action,[48] forbidden by the rule long since laid down in *Ex parte Bain*, 121 U. S. 1.

[48]The proceedings under this indictment have rendered it defective in another respect, for the lower court was unable to sustain the membership clause except as a statute punishing conspiracy (R. 459). For the reasons heretofore given (*supra*, pp. 31-32), we question the validity of this construction of the clause. But if it were to be adopted, the inevitable consequence would be that the petitioner has been convicted of a crime for which he was not indicted.

Either "activity" is an essential element of the offe under the membership clause, or it is not.[44] If not, government must support its constitutionality without s limitation. If so, then the indictment omits to charge essential element, and is defective under Rule 7(c) of Federal Rules of Criminal Procedure, which requires t indictments contain "the essential facts constituting the fense charged." Before trial the defense unsuccessfu moved to dimiss the indictment on this very ground (amo others) that it did not embrace the elements of the offe as defined by the Solicitor General. Under numerous de sions of this Court and the lower federal courts it is cl that, if "activity" is an element of this offense, the con tion must be reversed and the indictment dismissed. *Uni States* v. *Carll*, 105 U. S. 611; *Morisette* v. *United Sta* 342 U. S. 246; *United States* v. *Lamont*, 18 F. R. D. (S. D. N. Y.), aff'd 236 F. 2d 312 (C. A. 2); *Uni States* v. *Schneiderman*, 102 F. Supp. 87 (S. D. Cal.).

Likewise, if "activity" is read into the clause in acco ance with the Government's theory and the trial cou charge, the clause is rendered so vague as to be insuffici as a standard of guilt under the due process clause of Fifth Amendment. *United States* v. *Cohen Grocery C* 255 U. S. 81; *Musser* v. *Utah*, 333 U. S. 95. How m "activity" over how long a period of time makes one "active" member of an organization? The painful ina quacy of the standard is reflected in the trial judge's cha

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[44]The Government has sought to have it both ways. The instr tion on "activity" (R. A41) was given at the prosecution's requ even though the trial judge thought it unnecessary (Tr. 1934). defendant took exception (R. A47-A48). But in the Court of Appe in order to meet the argument that the indictment lacked the elem thus treated as essential in the charge, the Government argued (G Br. p. 34) that the instruction was "unnecessary".

(R. A41) that the defendant "must have devoted all, or a substantial part, of his time and effort to the Party."[45]

The court below brushed aside (R. 462) these arguments on the ground that "the defendant was not prejudiced by the instruction that in order to convict, the jury must find that he was not only a member but an active member of the Party." But this misses the point.[46] If activity is an element of the offense, the petitioner was prejudiced[47] not by the instruction to that effect but by the indictment's failure to specify this element, and by the statute's resultant vagueness.

If unlawful "activity" or conspiratorial incitement to violence is the burden of the Government's accusation against Scales, let him be indicted on that basis. Let the persons with whom he concerted and combined be named, the acts be specified, and the combination and joint action be proved under an indictment which embodies these charges. But under the present indictment, such a theory of the case necessarily involves an application of the mem-

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[45]*Cf. Noto* v. *United States*, decided December 31, 1958 (C. A. 2), pending here on petition for certiorari (No. 564 Misc.), in which the court reads the membership clause as applicable to "high level, active membership unremittingly devoted and pledged to the accomplishment of" violent overthrow.

[46]The defense objected to the instruction as prejudicial (R. A47-48, and *infra*, p. 56, note 71), and the Court of Appeals' own opinion is ample evidence of the confusion to which the instruction may give rise (R. 402): "This instruction [i.e. on "active" membership] was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of concrete action of an unlawful character". Of course, the *Yates* case expressly holds (354 U. S. at 330-31) by its acquittal of the five defendants who were very active functionaries, that Party activity is not evidence of action-inciting advocacy.

[47]Although a defective indictment which is not challenged prior to trial will be upheld unless the defendant is prejudiced, this is not true where (as here) the indictment is challenged as insufficient prior to trial. *Cf. Hagner* v. *U. S.*, 285 U. S. 427.

bership clause which is unconstitutional under the Fifth and Sixth Amendments.

III. THE INDICTMENT FAILS TO STATE AN OFFENSE UNDER THE LAWS OF THE UNITED STATES.

In any prosecution of a Communist Party member under the membership clause, the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f) is given the effect that logical analysis requires and the legislative history supports, it is a bar to such prosecutions.[48] Accordingly, the indictments in this and similar cases fail to state an offense under the laws of the United States.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute". The court below, relying on the phrase "*per se*", held (R. 461) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government". Such membership is not "mere" (i. e. "*per se*") but "with knowledge", and this added element removes it from the scope of Section 4(f).[49]

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[48]Since Section 4(f) applies only to prosecutions of members and officers of "any Communist organization", it does not repeal the membership clause of the Smith Act, which applies to membership in any organization of persons who advocate violent overthrow of the government. Rather, Section 4(f) limits the scope of the clause by excluding the category of persons specified in Section 4(f).

[49]The Court of Appeals has also relied (227 F. 2d at 589) on Section 17 of the Internal Security Act (50 U. S. C. 796), which provides that: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes". On familiar principles of construction, however, this general provision does not override the specific reference in Section 4(f) to "any other criminal statute". *Ginsberg & Sons v. Popkin*, 285 U. S. 204.

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatible with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

A. Legislative History of Section 4(f) of the Internal Security Act of 1950

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "congressional finding of necessity" in which "Congress finds" that (paragraphs 6 and 15) the Communist movement in the United States, including Communist organizations that "designate themselves as political parties", is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." in order to set up a "Communist totalitarian dictatorship" which will be "subservient" to other such dictatorships. There is no doubt, in the light of this finding, that Congress in enacting the Internal Security Act regarded the Communist Party as a group of persons who advocate and encourage the violent overthrow of our Government, such as is described in the Smith Act.

Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . . or . . . individual". Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members. Especially in view of the "Congressional

finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was originally added to Section 4, as the legislative history indisputably shows.

In the Eightieth Congress, the precursor bill, known as the Mundt-Nixon bill,[50] contained no immunity provision of any kind. In the next Congress, and while a successor bill[51] was under consideration in the Senate Judiciary Committee, the late John W. Davis pointed out, in a letter to the Committee, that the compulsory registration provisions might be unconstitutional as compelling self-incrimination under the section of the same bill making it a crime to conspire to establish a foreign-controlled totalitarian dictatorship in the United States.[52] This letter appears to have instigated the language thereafter inserted in both House and Senate that developed into Section 4(f) of the Act.

The House bill[53] was reported out with a provision which merely forbade the receipt in evidence of the fact of registration in prosecutions under the Internal Security Act itself. On the floor, Congressman Celler pointed out that this provision was not only deficient under the rule of *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), but also that it furnished no protection against prosecutions under the Smith Act.[54] Shortly thereafter the manager of the bill[55] offered an amendment, adopted *viva voce*, which

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[50]H. R. 5832 (80th Cong., 2nd Sess.). This bill passed the House but died in the Senate.

[51]S. 2311 (81st Cong., 1st Sess.).

[52]S. Rep. No. 1385, 81st Cong., 2nd Sess., pp. 43-44.

[53]H. R. 9490 (81st Cong., 2nd Sess.), passed by the House on August 29, 1950.

[54]96 Cong. Rec. 13739-13740.

[55]96 Cong. Rec. 13761. The manager was Congressman Wood who was also then Chairman of the Un-American Activities Committee. His amendment, of course, accomplished nothing in terms of the *Counselman* case, *supra*.

granted the same protection against prosecutions "for any alleged violation of any other criminal statute."

The Senate bill,[56] in the meantime, was reported out with a provision that neither membership nor office-holding in any Communist organization should constitute a violation of the Internal Security Act. In a minority report,[57] Senator Kilgore pointed out this provision "does not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act." The same criticism was made on the Senate floor by Senators Humphrey, Lehman, and Kefauver,[58] but it was not amended in the respect prior to its passage by the Senate. In conference, however, Section 4(f) assumed the form in which it was enacted into law, and it was there that the words "per se" and "or of any other criminal statute" were added to the first sentence,[59] with which we are presently concerned.

B. Section 4(f) is a Bar to the Prosecution of Communist Party Members and Officers under the Membership Clause

This conclusion follows inevitably from the logic and legislative history of Section 4(f). Plainly, Congress added the words "or of any other criminal statute" with the membership clause specifically in mind. And the Government (as well as the court below) misses the essential point when it argues, as it did when the case was last here (Brief for the United States on petition for certiorari, pp. 13-14), that Section 4(f) was not intended to modify any other statute but only "to insure the enforceability of the registration provisions of the . . . Internal Security Act. . . . by making the privilege against self-incrimination unavail-

[56] S. 4037 (81st Cong., 2nd Sess.).
[57] S. Rep. 2369, Part 2 (81st Cong., 2nd Sess.).
[58] 96 Cong. Rec. 14190, 14479, 15198-99.
[59] H. Rep. No. 3112 (81st Cong., 2nd Sess.); 96 Cong. Rec. 15280.

able as a defense to failure to register." For that could be accomplished by giving Communist registrants imm from prosecution on the basis of membership.[60] I words "or of any other criminal statute" do not app the Smith Act, they are meaningless surplusage, for is nothing else for them to accomplish.

The distinction drawn below between "mere mer ship" and "membership with knowledge" is unter Whatever may be held to be the legal effect of Se 4(f), its purpose would be entirely frustrated by co ing its scope in accordance with the decision below in case. For the lower court's construction would ex from its coverage all Communists who know the objec of the Communist organization to which they belon found by Congress in Section 2 of the Act. It would be an inevitable consequence of the decision below Communists who know the Congressionally-found pur of their organization are given no immunity under tion 4(f) and could plead the privilege against sel crimination to avoid compliance with the registr provisions, which thus would be binding only on munists who do *not* know their organization's purp

In short, the construction adopted below turns entire statute into an absurdity. Plainly, membership se" means membership without other criminally signi acts or declarations, not membership without know of the purposes of the group. No other interpret accords with common sense and the plain purpose provision.[61]

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[60]Whether or not Section 4(f) successfully accomplishes tended purpose is another question, not here at issue. *Cf. Com Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

[61]*Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It also be noted that both Sections 4(a) and 4(c) make kno an element of the crimes they proscribe, so that if Section 4(f construed to cover only membership without knowledge, it

It may be added that in 1954 Congress, during the debates on the bill that became the Communist Control Act of 1954 (50 U. S. C. 841-844), again manifested its understanding that Section 4(f) of the Internal Security Act bars the prosecution of Communists for membership with knowledge.[62] To the original bill (S. 3706, 83rd Cong. 2nd Sess.), Senator Humphrey offered an amendment containing a Congressional finding (parallel to that in Section 2 of the Internal Security Act) that the Communist Party aims to overthrow the Government by force and violence, and a criminal proscription of membership in the Communist Party with knowledge of its purposes. 100 Cong. Rec. 14208. This, of course, was substantially the same as the "membership clause" of the Smith Act.[63]

Had the penal provisions of the Humphrey amendment been enacted, they might have operated as a *pro tanto* repeal or modification of Section 4(f) of the Internal Security Act—i.e., they might have reinstated the liability of Communists to prosecution for membership with knowledge under the new legislation *or* under the membership clause of the Smith Act. This, in turn, would have greatly fortified the plea of self-incrimination by Communist Party

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be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[62]Of course, there is no suggestion here that the Communist Control Act of 1954 amended or repealed the membership clause. The argument is simply that the legislative history of the Communist Control Act reinforces the conclusion that Section 4(f) of the Internal Security Act limited the application of the membership clause by excluding Communist organizations from its coverage.

[63]The principal difference, irrelevant here, was that, since the Communist Party was specifically named in the Humphrey Amendment, presumably no proof of its violent purposes would have been required.

members under the registration provisions of the Internal Security Act—the very eventuality which it was the purpose of Section 4(f) to avoid. In short, Congress confronted in 1954 the identical problem it had confronted in 1950.

And so, as a result of representations from the Attorney-General and objections from many Senators and Representatives (*e.g.* 100 Cong. Rec. 14611, 14640, 14711, 14713, 14719) the criminal sanctions for membership were stricken from the Humphrey Amendment, and thus Section 4(f) of the Internal Security Act was left intact and operative to bar the prosecution of Communists for membership with knowledge, whether under that Act, the membership clause of the Smith Act, or "any other criminal statute".

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States and the judgment below must be reversed.

IV. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION UNDER THE SMITH ACT.

In the *Dennis* case, *supra*, this Court referred (341 U. S. at 516) to its own duty to review convictions under the Smith Act "with the scrupulous care demanded by our Constitution." In the *Yates* case, *supra*, the Court performed that duty by reviewing the evidence against each of the fourteen defendants, in order to determine whether acquittals should be directed, or the avenue to a second trial left open. In respect of five defendants, the evidence was found (354 U. S. at 331) "entirely too meager to justify putting them to a new trial" and their acquittal was ordered.

Nor did the Court find the evidence sufficient to sustain the other nine convictions. It merely found (354 U. S. at 332) that the evidence was not "so tenuous as not to justify their retrial under proper legal standards." Accordingly, while these convictions were reversed on the other

grounds settled in the *Yates* case, the nine defendants were not acquitted, and the Government was left free to bring them to trial again. However, the Government has not done so.[64]

The evidence against the petitioner must be scrutinized here in the light of the significant differences between the membership clause and the other provisions of the Smith Act. A member of the Communist Party who is indicted for conspiracy to violate the advocacy and organizing provisions of the Smith Act is charged with individual activity in combination with the other conspirators. Therefore, even if the prosecution fails—as this Court in the *Yates* case held that it had failed—to establish that the Communist Party as an organization advocates forcible overthrow in an action-inciting way, a defendant in a conspiracy case can be found guilty if it be proved that he and others conspired to advocate or organize in violation of the Smith Act.

But a defendant under a membership clause indictment, such as the petitioner, is not charged with violating or conspiracy to violate the advocacy and organizing provisions. He is charged only with membership in a group whereof the purposes are to advocate forcible overthrow. Therefore, unless it be proved that the Communist Party is such a group, the appellant's conviction cannot be sustained. In other words, in a membership clause case, the prosecution must establish what, as this Court determined, it failed to establish in the *Yates* case.

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[64]Nor has the Government retried the defendants in the Pittsburgh Smith Act case, *United States* v. *Mesarosh*, 352 U. S. 1, wherein this Court reversed the convictions because of the "tainted testimony" of a prosecution witness. The result is that leading national officials of the Communist Party such as William Schneiderman (a *Yates* case defendant and for a long time leader of the Communist Party on the West Coast) and Steve Nelson (Mesarosh) have gone free from further prosecution under the Smith Act, while the appellant Scales has been tried again and given a heavier sentence than any other Smith Act defendant has ever received.

A. The Evidence With Respect to the Communist Party

In the *Yates* case, this Court found (354 U. S. at 329) the evidence insufficient to establish that the Communist Party advocates forcible overthrow of the Government "in the sense of a call to action at some future time." To be sure, the evidence was sufficient to show that the "abstract doctrine of forcible overthrow" was "one of the tenets of the Communist Party." But given the requirement of action-inciting advocacy, the Court found the record "strikingly deficient" (354 U. S. at 329-30):

> At best this voluminous record shows but a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy. Most of these were not connected with any of the petitioners, or occurred many years before the period covered by the indictment. We are unable to regard this sporadic showing as sufficient to justify viewing the Communist Party as the nexus between these petitioners and the conspiracy charged.

At the close of the prosecution's case, the petitioner moved (R. A18) for a judgment of acquittal, and in support thereof filed a memorandum (R. A25-A32) embodying an item-by-item comparison of the prosecution's evidence with the evidence in the *Yates* case found insufficient by this Court. As the memorandum shows, the evidence in the two cases is substantially identical. Every important strand of proof about the Communist Party that was presented at this trial had also been presented in the *Yates* trial.

This similarity is hardly surprising, for both the documents and the witnesses, of which the record in this case is the product, are veterans of numerous prior Smith Act trials. The basic Communist "classical" writings by Marx, Lenin, Stalin, and others, after all, could hardly be improved on by the Government's later efforts, however

zealous.[65] Of the prosecution's principal witnesses on the aims of the Party, Lautner had testified in seventeen Smith Act trials including the *Yates* trial (Tr. 450-51), and Mrs. Hartle had testified on the subject of Communism in nine prior trials (Tr. 893) and Cummings in six (Tr. 947-48). Without a remarkable and therefore suspicious refreshment of recollection, the prosecution witnesses' testimony about the Communist Party was bound to parallel, as it did, the earlier testimony on that subject in the *Yates* case.[66]

The prosecution sought to escape this dilemma and give the record some new color in two ways. The first was to call a greater number of witnesses then was called in the first trial,[67] in order to show a uniform pattern of instruction and indoctrination at the several and widely-scattered Party schools attended by the witnesses. However, the practical effect of this extensive testimony was merely cumulative. It added nothing beyond what was before this Court in the *Yates* case, in which there was abundant testimony that the Communist Party schools, as part of a nation-wide campaign for re-education of Party members after 1945, and in order to stamp out Earl Browder's "revisionism," taught the inevitability of force and violence in the achievement of Socialism, the dictatorship of the proletariat, the class struggle, and other such elements of "Marxist-Leninist doctrine" (R. A26-A30).

To meet the *Yates* case requirement of action-inciting advocacy, the prosecution relied chiefly on the three documents discussed heretofore (G. Exs. 64; 65, and 66, *supra*, pp. 34-39), and on testimony describing the various

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[65]The prosecution's basic documentary proof about the purposes of the Communist Party was in fact substantially the same in both the *Yates* case and the present case (R. A31).

[66]The duplicating items and strands of proof are listed in the memorandum in support of the motion for acquittal (R. A26-A-30).

[67]Lautner, Clontz, and Childs were the only prosecution witnesses at the first trial.

kinds of action that the prosecution witnesses took or were urged to take while in the Communist Party. For the reasons already given (*supra*, pp. 34-41), the admission of these documents and similar evidence has raised insuperable constitutional obstacles to the application of the Smith Act in this case. But apart from these constitutional problems, the prosecution's evidence completely failed to meet the standards required by the *Yates* case.

The general nature of the prosecution's proof is reflected in the extracts in the printed portions of the record. Lautner's testimony on Party action was redundant and general (R. A3, 105-08). Mrs. Hartle discussed (R. A3-A4) Communist Party propaganda about the Korean War, basically similar to the three documents by which the prosecution set such store. On cross-examination she was asked to describe her Party activities in detail; her testimony in response (R. A5-A6) is utterly devoid of anything resembling a "call to forcible action."

Both Lautner and Mrs. Hartle testified at considerable length concerning the Communist "underground." Although the prosecution strove manfully to give this the sinister aspect of a Party organization for secret revoluntionary work, it emerged clearly enough (R. A6-A7; Tr. 514-18 and 860-67) that the "underground" was caused by the Smith Act prosecutions of Communist leaders that began in 1948, and was simply a matter of going into hiding to avoid arrest under that Act and preserve the rudiments of Party organization.[60] At all events no evidence of underground activity of an unlawful nature is to be found in the record.

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[60] J. Edgar Hoover, Director of the Federal Bureau of Investigation, recently described the Communist "underground" in much the same way. Hoover, *Masters of Deceit* (1958), pp. 75-76:

> "In 1948, for the first time since the 1920's the Party found itself on the defensive when the Department of Justice initiated prosecution against its leaders. The twelve members of the Party's National Board were indicted under the Smith Act

The Court of Appeals wholly failed to deal with this problem;[69] there is not a word in its opinion about the evidence reviewed in the *Yates* case. There is no specification of evidence about the Communist Party, given at petitioner's second trial, which might be deemed to meet the crucial deficiencies noted by this Court in the *Yates* case. The opinion below recites the evidence at length (R. 463-71), but the conclusory summation (R. 477-79) contains absolutely nothing that was not equally present and relied upon by the prosecution in the *Yates* case. And so the strange outcome

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(enacted in 1940), which prohibits any conspiracy that advocates the overthrow of the United States government by force and violence. . . .

"In a long trial, running through most of 1949, eleven members were convicted, the twelfth, William Z. Foster, having been severed from the trial because of illness. In June, 1951, the Supreme Court upheld these convictions, and the government subsequently took prosecutive action against additional Party leaders.

"This government prosecution was a strong disabling blow against the Party. Many of its top leaders were arrested and convicted. Others lived in fear of arrest. As a result the Party to a large extent went underground in the first large-scale underground operation since the early 1920's. Party offices were closed, top Party leaders went into hiding, records were destroyed. Courier systems were instituted and clubs broken up into small units, if not completely disbanded. For about four years, from mid-1951 to mid-1955, the Party in protecting itself spent energy, time and money that otherwise would have gone into agitation and propaganda."

[69]This failure is the more remarkable in that, although the Government tried to contend (Govt. Br. pp. 36-40) that the evidence against the Communist Party at Scales' second trial was stronger than in the *Yates* case, it also declared (*Id.* pp. 31-32) that the evidence at Scales' second trial was not "qualitatively different from that adduced at his first trial." When the *Scales* case was last before this Court, the Solicitor General (Brief for the United States No. 29, October Term, 1956) described the evidence about the Communist Party as (p. 7) "very similar and in some respects identical" and (p. 57) "substantially similar" to that in 17 other Smith Act cases, including the *Yates* case. Under these circumstances, the court below might well have inferred that the government's evidence about the Communist Party, after some 20 trials, is not easily altered, and that this Court's analysis of that evidence might be pertinent here.

is that the Communist Party has been found to be an action-inciting organization in Greensboro, on the basis of evidence substantially similar to that which this Court held insufficient in Los Angeles.

B. The Evidence With Respect to the Petitioner

The prosecution's case in support of the charges that Scales knew the Communist Party as an organization that advocates forcible overthrow of the Government, and that he personally intended to bring about such overthrow, rests entirely on the testimony of the witnesses Clontz, Childs and Reavis. Through them, the prosecution offered considerable vidence of Scales' activities as a Party member and local official, upon which it heavily relies to establish Scales' knowledge of the Party's unlawful aims. But of course Party activities, extensive though they may be, do not constitute sufficient evidence of personal knowledge or intent. As Judge Dimock observed during a Smith Act conspiracy trial:[70] "I think there must be some showing that the activities were such as to bring them (the defendants) in contact with the particular tenets of the Party that are treated as illegal . . ." Mere attendance at Party meetings is poor evidence of knowledge and no evidence of personal intent to overthrow the Government as soon as possible. To support such inferences, the Party activities must somehow be "in contact with" the Party's unlawful aims.[71]

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[70] *United States* v. *Flynn*, C. 136-7 (S. D. N. Y.), aff'd 216 F. 2d 354, convictions of two defendants set aside, 130 F. Supp. 412. The quotation is from the colloquy during argument on motion for a directed verdict of acquittal (Tr. 9961 of C. 136-7).

[71] Nevertheless, as described *supra*, pp. 41-43, the trial court charged the jury, over objection, that the defendant would be criminally liable only if he was an "active" member of the Party. The defense excepted to this instruction, on the ground that it was phrased in such a manner as to suggest to the jury that guilty knowledge might be inferred from mere activity.

In fact, the evidence with respect to Scales' knowledge and intent is so stale and sparse as to be plainly insufficient for either constitutional or statutory purposes. The only testimony relating to any declaration by the appellant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns two conversations with Clontz (R. 246-47, 263-65 and 473-74) in December, 1948 and March, 1950, long before the beginning of the three-year limitations period. Assuming the truth of Clontz' testimony, [72] the petitioner's statements amounted to nothing more than abstract Communist Party doctrine, and establish neither his knowledge of any action-inciting advocacy by the Party, nor his personal intent to overthrow the Government by force.

The remarks attributed to the petitioner by Clontz refer to the supposed impossibility of achieving communism by means of education and the ballot alone, without the use of force. The opinions said to have been expressed by Scales are very similar to those attributed to the defendants in *Nowak* v. United States, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S., 670, 672-73. In the former, for example, Nowak was said to have stated at various Party meetings and gatherings (356 U. S. at 665-68) that the Party could not gain its ends by means of the ballot but that "it would eventually resolve to bullets", and that "the goal of all of this activity was to extend the Soviet system around the face of the earth." But this Court ruled that remarks of this type establish nothing more than "abstract predictory opinions", and fail to show "advocacy of violent action."

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[72] The earlier of these statements was said to have been made during the second meeting and first conversation about Communist Party doctrine between Scales and Clontz. It seems highly unlikely that Scales would have discussed violent overthrow with Clontz as almost a complete stranger.

The testimony of the witnesses Reavis and Childs concerned activities of and declarations by the petitioner that are highly controversial and certainly are anathema to most Americans. But their testimony contains nothing that supports Scales' conviction under the Smith Act as construed in the *Yates* case. In an effort to comply with the "action-inciting" standard of proof, Childs, prepared a list, from which he testified, of all the activities he was asked to engage in while he and the petitioner were members of the Communist Party (R. A14-A18). His testimony in this respect may be examined in vain for any indication of action directed toward the forcible overthrow of the Government, or activities that were in any way unlawful. The prosecution, by a leading question, brought out that Childs was urged to write letters seeking leniency for the Rosenbergs (R. A17-A18), but this helps the Government's case not at all and simply compounds the constitutional problems (*supra*, pp. 34-39), underlined by the trial court's refusal to give the defendant's proposed instruction No. 7 (R. A33-A34).

Childs and Reavis both testified about experiences which occurred while appellant was in the "underground," and the prosecution bore down very heavily on this matter in summation (R. A24-A25; Tr. 2103-04, 2181-83). But here, again, the Government was unable to produce a scintilla of evidence of incitement or unlawful activity on the petitioner's part. Indeed, its failure was so complete that in summing up to the jury, the prosecuting attorney was obliged to concede that (R. A24-A25): "He [Scales] was underground for three years; where he was, we don't know. What he did, we don't know. Who he contacted, how many converts he brought to communism, we don't know."

In the upshot, there was nothing to support the judgment of conviction, insofar as it is based on the petitioner's personal knowledge and intent, other than inferences that might be drawn from Scales' Party membership and offi-

holding. But these are not sufficient under the Constitution or the Smith Act as expounded in the *Dennis* and *Yates* cases. Referring to persons debarred from naturalization for advocacy of violent overthrow of the Government, Justice Reed, dissenting in *Bridges* v. *United States*, 346 U. S. 209, at 234, observed that "there is no necessary identity in law between Communist Party members and such persons." The Government must establish far more than Party membership and activity in order to prove guilty knowledge and intent.[73] But in this case the prosecution was empty-handed and Scales' conviction must be reversed.

V. THE PETITIONER WAS DENIED A FAIR TRIAL.

The petitioner's indictment and trial were vitiated by numerous prejudicial errors, of which four are before this Court for review on certiorari.

A. The Grand Jury Was Illegally Impanelled.

Prior to the first trial, appellant filed a motion challenging the grand jury panel which returned the indictment. The hearing showed that the method for securing names of the panel was that the clerks and jury commissioner requested various individuals, such as local sheriffs, superintendents of public schools, bank presidents, and the Chairman of the Republican and Democratic Parties in the counties in the District, to provide the names of persons who were "suitable for jury service." The only information received by

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[73] See *People* v. *Lloyd*, 304 Ill. 23, 88, 136 N. E. 505, 530 (1922), per Thompson, C. J. (under an Illinois statute comparable to the Smith Act): "Individuals ought not to be condemned for mere membership in organizations, nor should they be held to believe in, advocate, and work to accomplish every word, sentence, or plank in their party platforms . . . There must be proof of a conscious guilt by individual action before it can be said that the individual adopts and approves the language of the party platform."

the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel either prior to or after placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors.[74]

The federal statutory provisions (28 U. S. C. 1861 and 1864) governing the qualifications and methods of selecting grand and petit jurors are set forth in the Appendix (*infra*, pp. 6a-7a). The statute expressly provides that the names of grand and petit jurors shall be "publicly drawn from a box containing the names of not less than 300 qualified persons at the time of each drawing." This provision is mandatory and places upon the jury commission the non-delegable responsibility to see that the panel is drawn from among at least 300 persons, duly qualified in accordance with the statutory standards.

It is apparent that the method used here did not meet the statutory requirements. It was impossible for the jury commission to know whether or not the box contained the names of 300 qualified persons at the time of the drawing. All that the jury commission knew was the name of the person and his address. The commission knew nothing of the prospective juror's age, ability to read and write, mental or physical condition, character, intelligence or previous penal history. Nor were the persons who supplied the names informed of the qualifications for jurors.

The purpose of the statutory scheme for jury selection is to provide qualified jurors who are fair and impartial. A person presented before a grand jury, as well as the Government, has the right to have the prospective jurors drawn from a box containing the names of three hundred

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[74]See the transcript of Hearing on Motions, April 1, 1955, fol. 15-169.

qualified jurors. In *United States* v. *Silverman* 129 F. Supp. 496 (D. Conn. 1955), a challenge to the grand jury panel in a Smith Act case was upheld, and the indictment dismissed. The court held (at p. 511):

> "The failure by the jury commission to have determined that there were at least three hundred qualified names in the box at the time of the drawing of the grand jury . . . was a breach of the affirmative statutory duty imposed upon the commission and is fatal to the indictment . . ."

This defect in the procedure of selecting jurors, which was caused by the nonfeasance of the jury commission, invalidates the conviction even without a showing of prejudice to the defendant. For ". . . reversible error does not depend on a showing of prejudice in an individual case . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". *Ballard* v. *United States*, 329 U. S. 187, 195.

The method of selecting jurors was also an illegal delegation of the jury commission's duties. It is the duty of the clerk to select the names that go into the jury box, and that duty cannot be delegated. *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Murphy*, 224 Fed. 554. The names supplied by sheriffs, superintendents of schools, presidents of banks, and Chairmen of the Republican and Democratic Parties would be most unlikely to result in a panel consisting of a fair cross-section of the community. Under such circumstances, the jury panel is invalid. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. Accordingly, the judgment should be reversed with instructions to dismiss the indictment.

B. A Fair Trial Was Precluded by the "Congressional Findings" in the Internal Security Act of 1950 and Communist Control Act of 1954

The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already been described.[75] The former finds that the Communist Party "is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence."

The indictment here charges and the Government offered evidence which it claims to be proof that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. For the jury here to find that the Communist Party does not advocate the violent overthrow of the government, it would have had to flout the Congressional finding.

In the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence. *Cf. Delaney* v. *United States*, 199 F. 2d 107. Accordingly, the judgment of conviction must be reversed.

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[75] *Supra*, pp. 45-46.

C. Prejudicial Error was Committed by Denial of Petitioner's Request to Examine the full Texts of Written Statements Furnished to the Federal Bureau of Investigation by Prosecution Witnesses.

The trial court denied petitioner's request to examine the full texts of statements furnished to agents of the Government by prosecution witnesses. The conviction following his first trial had been reversed by this Court on the authority of *Jencks* v. *United States*, 353 U. S. 657. But several months after the *Jencks* decision, Congress enacted Public Law 85-269, now 18 U. S. C. 3500 (Appendix *infra*, pp. 7a-9a). Under the procedure prescribed in this statute, the materiality of the reports requested by the defense, if challenged by the prosecution, is determined by the trial court *in camera*. In the present case, the prosecution did challenge the materiality of certain portions of the reports requested by the defense; such portions were then submitted to the trial judge for his review as prescribed in 18 U. S. C. 3500, and many of them were withheld from the defense.

The defendant challenged (R. 196-97) the validity of the procedures set forth in the new statute, insofar as they operated to limit his access to the full texts of these documents.[75a] This very point was passed on by this Court in the *Jencks* case (353 U. S. at 668):

> "We now hold that . . . the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. "The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disproved. Relevancy and materiality for the purposes

[75a] See 64 Harv. L. Rev. 1013 (1951).

> of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See *Gordon* v. *United States*, 344 U. S. at 418."

It is clear from the foregoing passage that only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination. Anything less is a denial of due process of law. "Justice requires no less." *Cf. Bowman Dairy Co.* v. *United States*, 341 U. S. 214.

Furthermore, the definition of "statement" in sub-section (e) of Section 3500 is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently "approved" them and whether or not they are "substantially verbatim" or "recorded simultaneously." Finally, the application of Section 3500 in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation, since its effect is substantially disadvantageous to the petitioner, whose alleged crime was committed before the enactment of this statute.

D. Prejudicial Error was Committed in the Admission of Evidence Against the Petitioner

The petitioner's trial was conducted on the apparent assumption that anything ever said or written by any member of the Communist Party was admissible against him to prove the Party's unlawful aims.[76] The result was the

[76]The defense objected to the admission of such remote evidence from the very outset of the trial (Tr. 82, 114-15, 144, 159, and 161), but generally without success.

erroneous admission of much damaging evidence which was not binding on Scales, and much that was irrelevant to the issues in the case and highly inflammatory.

The three documents (G. Exs. 64, 65, and 66) relating to the Korean War were, beyond question, inflammatory and exceedingly prejudicial to the defendant. The prosecution did everything possible to exploit their emotional effect (R. A18-A22). The documents had no conceivable bearing on the issues in the case; nevertheless the trial judge permitted the prosecution to read to the jury such matter as the following (R. A21-A22):

> "As is often the case in Korea, the facts were worse than the rumor for at that time most Koreans were not acclimatized to the diabolical ruthlessness of the Americans and their puppets. Try to imagine Rangwul Valley, about five miles southeast of Taejon on the Yongdong Road. Hills rise sharply from a level floor about one hundred yards across and a quarter of a mile long. In the middle you can walk safely, though your shoes may roll on American cartridge cases, but at the side you must be careful for the rest of the valley is a thin crust of earth covering corpses of more than seven thousand men and women.
>
> "One of the party with me stepped through nearly to his hip in rotting human tissue. Every few feet there is a fissure in the topsoil through which you can see into a gradual sinking mass of flesh and bone. The smell is something tangible that seeps into your throat. For days after I could taste the smell. All along the great death pit, waxy dead hands and feet, knees, elbows, twisted faces and heads burst open by bullets, stick through the soil.
>
> "When I read of Nazi murder camps at Belsen and Buchenwald I tried to imagine what they were like. Now I know I failed . . .
>
> "American officers, with officers of the puppet army, went in jeeps on each day and supervised the butchery. Every witness agrees on this, and I asked several separately to show me where the jeeps and the

> Americans stood. There were emptied packets of American cigarettes lying around. All of the thousand cartridge cases on the ground were made in America. I picked up a handful of M-1 carbine cartridge cases which I have still. Every one was fired at a Korean, Korean patriot.
>
> "This was only one of the massacres carried out at American instructions."

The defense motion for a mistrial, made after this document was read to the jury (R. A23), was denied. Thereafter, the defense attempted to mitigate the prejudicial effect of this and other incompetent testimony by appropriate instructions to the jury[77], but these were refused.

There was a vast amount of other irrelevant testimony, perhaps not so gruesome but equally prejudicial. For example, nearly all of the Government's witnesses described Communist Party teachings concerning a so-called "Black Belt" of concentrated Negro population, throughout which the Negroes should be regarded as an oppressed "nation" with the right of self-determination (Lautner, R. 23; Mrs. Hartle, R. 163-67; Cummings, R. 451-52; Clonitz, R. 249; Reavis, R. 327-29; Jones R. 341-42; Childs, R. 383-84, 413, and 418-19). Yet the prosecution made no effort to relate this testimony to the advocacy of force and violence, or to show that the "doctrine" of the "Black Belt" was ever put forward in an action-inciting way.[78]

The vice of the evidentiary theory adopted below lies much deeper than these isolated examples suggest. The trial court treated the issue of the Communist Party's aims and objectives as entirely distinct from the issue of the appellant's knowledge of those aims. On this theory, the Court admitted unlimited testimony by the former Com-

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[77] Instructions Nos. 4, 5, 7, 18, and 21 (R. A32-A35).

[78] *Cf.* the similar evidence presented in *Herndon v. Lowry*, 301 U. S. 242, at 250-53, wherein the defendant's conviction of attempted insurrection was reversed.

munists who testified for the prosecution, even though the events they described were utterly remote from the defendant. Thus the entire first half (seven days) of the trial passed before the defendant's name was even mentioned (R. 244; Tr. 961). The 1945 national convention of the Communist Party in New York City, which is a crucial episode in the Government's case against the Communist Party, occurred while the defendant was serving in the armed forces of the United States in Bari, Italy (Tr. 1959).

In many law suits, of course, it may be important to establish the existence, non-existence, or nature of a circumstance in the observable world. The location and dimensions of a building, the height and weight of a man, the effective range of a revolver, the color and maximum speed of an automobile—such matters, we may assume at least for purposes of argument, may be shown by evidence regardless of whether or not the affected litigant is privy to it, and then the litigant's knowledge of the fact, if relevant, may be shown by evidence directed to his state of mind.

What, if anything, an organization advocates is ordinarily shown by its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations. If in Smith Act cases against Communist Party members, the prosecution should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time. Of course, it would still have to be shown that the defendant knew of the pertinent pronouncements, but ordinarily this would not be difficult if the pronouncements were of such a nature that they would come to the attention of all Party members as a matter of routine.

But it is not by such means that the Government has endeavored to prove the unlawful advocacy of the Com-

munist Party in the present case. This is for the simple but sufficient reason that the Party's official pronouncements do not advocate, and indeed expressly condemn the advocacy of, violent overthrow of the Government. The Party constitution adopted at the 1945 national convention expressly repudiates force and violence (G. Ex. 22; Tr. 438-40). The draft resolution adopted at the same convention (G. Ex. 23; Tr. 440-43) "is conspicuously free of any suggestion that the Party approved of inciting revolutionary force and violence." See *United States* v. *Silverman*, 248 F. 2d 671, 683 (C. A. 2). In 1948 the Party constitution was revised to provide for the expulsion from the Party of any member "who advocates force and violence or terrorism" (G. Ex. 32; Tr. 439-40).

Far from relying on the Party's official pronouncements, therefore, the Government's contention is that these are meretricious and self-serving disclaimers—"double talk" as Lautner put it (Tr. 439)—and that the Party's actual purposes must be ascertained from other evidence. And this "other evidence" consists almost entirely of the very third party declarations—whether in "classical" texts by Marx, Lenin, and Stalin, or in the opinion and hearsay testimony of witnesses such at Lautner and Mrs. Hartle—the admissibility of which is presently in question.

In approaching this problem it is important to bear in mind that the appellant and other defendants in Smith Act cases are not charged with conspiring or joining groups that intend to overthrow the Government,[79] but to *advocate* the duty and necessity of its overthrow. Conceivably the leaders of the Communist Party may in fact intend and attempt to bring this about. But the question is whether they propose to do this (at least in part) by means of advocacy. And this is not lightly to be assumed, for it is

[79] There is a distinct and much older federal statute prohibiting conspiracies to overthrow the Government by force (18 U. S. C. 2384)

altogether probable that governments are more often overthrown by groups which do not (at least openly) advocate violent overthrow, but proclaim their desire to protect the governments against the assaults and machinations of others.

If advocacy of violent overthrow is the only "substantive evil" at which the Smith Act is directed, and if (as is clear) the Communist Party established in 1945 does not in its official pronouncements so advocate but explicitly condemns such advocacy, the prosecution's charge against the appellant and other defendants in Smith Act cases comes down to this: that despite the categorical and contrary import of the Party's official pronouncements, the Party leaders *secretly* advocated violent overthrow among themselves and, perhaps, to others. And indeed this is precisely what the prosecution attempts to prove by means of the third-party declarations that are here under discussion.

But as soon as the issue is cast in this, its true shape, the incompetence and inadmissibility of the third-party declarations become apparent. If it is secret advocacy in contravention of open Party doctrine that is the basis of the charge, then it cannot be proved as against Party member A by what member B said to member C in A's absence. Nor can it be proved against member A by what member D wrote in a book, unless it is shown that A had read and understood the writing and knew it to embody the secret advocacy of the Party leadership. In fact, the issue is no longer "Party advocacy" in the customary organizational sense, but the secret advocacy of a group within the Party. Membership in that group cannot be proved against an individual by evidence of his membership in the Party, or by hearsay evidence of what other members were saying to each other or writing in books. See *Schneiderman* v. *United States*, 320 U. S. 118.

But the trial court imposed practically no bounds on the prosecution's scope and order of proof, or on the

evidence it offered about the Communist Party at any place and at any time during the course of this century. Defense objections on the grounds of lack of relevance or competence were summarily overruled (e.g. Tr. 101). The court allowed the prosecution to read extensively to the jury from documents, on the assumption that their connection with the defendant would be established later, despite defense objections that the reading should await connection (Tr. 158-60).

The prosecution subsequently established a connection between the defendant and a number of the Party documents, but much of its evidence could not possibly be connected. How could a connection be shown between the teaching at a Party school attended by Lautner in New York in 1930 (R. 7-16; Tr. 87-105) when the defendant, in Greensboro, was not yet of high school age? Why should Scales be bound by Mrs. Hartle's testimony about unemployed workers' demonstrations during that same year (R. 149-50; Tr. 604-05), or her story of Communist control over the personal lives of a few individuals in Seattle (Tr. 723)? Yet these are but two examples of a staggering volume of testimony about persons and events far removed from the defendant, and generally irrelevant to the issues in the case.

To be sure, a federal district judge has a considerable range of discretion with respect to the order and scope of proof at a trial. But in this case the discretion was abused to a degree that hopelessly prejudiced the defendant. It is too much to expect that a jury which has heard a full week of testimony about the Communist Party "subject to connection" will be able to lay it all to one side, and give weight only to such portions as are later made binding on the defendant. Nor, under such circumstances, can the jury be expected to winnow the few kernels of material evidence from the chaff of erroneous and prejudicial testi-

mony about "Black Belts," the Stockholm peace appeal (R. 186-88), and American policy in China (R. 188-89; Tr. 666-70).

Having objected unsuccessfully, the defense subsequently moved to strike the testimony of Lautner, Mrs. Hartle and the other three witnesses to whom the appellant was a total stranger and who knew nothing of his actions and statements. The motion was denied (Tr. 1828). The defense then requested instructions (R. A32-A35) which might have mitigated the prejudicial effect of the erroneous evidentiary rulings, and excepted to certain portions of the charge which aggravated the prejudice (R. A47-A48; Tr. 2214-16). But the court refused to charge as requested by the defense, and the short supplementary charge given following the defense exceptions (R. A48) was altogether insufficient to correct the situation. The erroneous and prejudicial character of the evidentiary rulings is clear, and the judgment of conviction must be reversed.

CONCLUSION

The statute under which Scales has been convicted is in conflict with the overall pattern of legislation in the field of national security, as Congress soon realized when it was shaping the Internal Security Act of 1950. Whether or not the registration provisions of that Act are either wise or constitutional is not here at issue. Wise or unwise, they embody the deliberate purpose of Congress. Manifestly, that purpose would be most effectively frustrated by the constitutional consequences of enforcing the membership clause against Communists. This danger was clearly perceived in Congress, and steps were taken to ward it off by language added to the Act for that specific purpose. It is remarkable that the Government should have embarked on prosecutions such as this one, so patently at war with Con-

gressional purpose and so dangerous to the effective administration of the Internal Security Act.

The membership clause itself does not embody the considered judgment of Congress, but merely a hasty copying from state statutes enacted in a period not notable for calm or reflective judgment. As Justice Brandeis remarked,[80] the statute undertakes to punish "association with those who propose to preach" a doctrine. As a concept of criminal liability this is novel, noxious, and unnecessary, and this Court should give it no countenance.

It is respectfully submitted that the judgment of the court below should be reversed.

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[80] *Whitney* v. *California*, 274 U. S. 357, 373.